The Madras Law Journal

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, CJ., M. A. Sathar Sayeed and S. Nainar Sundaram, JJ.*

K. Suresh Babu .. *Appellant**

v.

K. Balasubramaniam and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rules* 72 *and* 90—*Application to set aside sale—Scope of Order* 21, *rule* 72—*Application under Order* 21, *rule* 72, *different from application under Order* 21, *rule* 90.

A reading of rule 72 of Order 21, Civil Procedure Code, would clearly show that sub-rule (3) did not require that a Court can set aside the sale under that Rule only if the person who applied for setting aside the sale proved that he had sustained substantial injury by reason of the breach of Order 21, rule 72 (1). [*Para.* 4.]

Order 21, rule 72 (3) did not refer to the applicant sustaining any substantial injury at all while Order 21, rule 90 of the Code did refer to it and made proof thereof a condition precedent for setting aside the sale. In view of this basic difference in the language, it was not possible to hold that the considerations applicable to an application under Order 21, rule 90, should be applied to an application under Order 21, rule 72 (3) of the Code. [*Para.* 12.]

The requirement that a decree-holder should obtain the permission of the Court before purchasing the property was intended for the benefit of the judgment-debtor in view of the stronger position in which the decree-holder was placed. That was why Order 21, rule 72 (1) used the word "shall" and not "may". That meant, the obtaining of the permission of the Court was mandatory before a decree-holder could bid at the auction and purchase the property and if the decree-holder without obtaining such permission or in spite of refusal of such permission bid at the auction and purchased the property, certainly he contravened a mandatory provision of law. Further the statute had deliberately used the word "express" before "permission" thereby indicating the stringency of the provision it was making. [*Para.* 13.]

An application filed under Order 21, rule 72 (3) of the Code of Civil Procedure, was an independent application and it had to be dealt with in accordance with the language contained in sub-rule (3) of rule 72 and that sub-rule did not insist that a sale could not be set aside if it had taken place contrary to the provisions of that rule unless the applicant established that he had sustained substantial injury. [*Para.* 14.]

Cases referred to:—

Gundu Venkatalingam v. *Kantheti Venkata Ranganayakulu,* I.L.R. (1955) Mad. 675; *Rai Radha Krishna* v. *Bisheshar Sahay,* (1922) I.L.R. 1 Pat. 733: 44 M.L.J. 718: L.R. 49 I.A. 312: 16 L.W. 190: A.I.R. 1922 P.C. 336; *Thathu Naick* v. *Kondu Reddi,* (1909) I.L.R. 32 Mad. 242; *Kondapalli Tatireddi* v. *Diduvani Ramachandra Rao,* 13 L.W. 616: A. I. R. 1921 Mad. 402; *Kotta Govindarajulu Chettiar* v. *Sivaramakrishnan,* (1952) 2 M.L.J. 294: 65 L. W. 799: A.I.R. 1953 Mad. 822; *Mathura Das* v. *Nathuni Lall Mahta,* (1885) I.L.R. 11 Cal. 731; *Jiteswari Dassi* v. *Sudha Krishna Mukherjee,* A.I.R. 1932 Cal. 672.

Appeal against the order of the X Additional Judge, City Civil Court, Madras dated 14th August, 1979 and made in E.A. No. 1435 of 1977 in E.R. No. 391 of 1975 in O.S. No. 174 of 1973.

P. R. Varadarajan, for Appellant.

V. Ganapathy Subramania Iyyer, for Respondents.

*A.A.O. No. 231 of 1980. 17*th July,* 1980.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the order of the X Assistant Judge, City Civil Court, Madras dated 14th August, 1978, made in E.A. No. 1435 of 1977 in E.P. No. 391 of 1975 in O.S. No. 174 of 1975. E.A. No. 1435 of 1977 was filed for setting aside the sale which was held on 25th January, 1977, in execution of a decree obtained in O.S. No. 174 of 1973. The case of the petitioner in the execution application, who was the judgment-debtor, was that the purchase at the Court auction was a benami purchase by the decree-holder and therefore the sale should be set aside. He also put forward the contention that the property was worth Rs. 1,50,000 but it was sold only for an inadequate price of Rs. 30,150 and thereby he sustained a substantial injury. The learned Assistant Judge, City Civil Court, Madras recorded a finding that the purchase at the Court-auction-sale was a benami one by the decree-holder. Having held so, in respect of the question whether the property fetched an adequate price or not, he did not render a definite finding. However, he did say in his order that the judgment-debtor sustained substantial injury by reason of the irregularity in the conduct of the same. On his finding that the purchase was a benami one by the decree-holder and no permission as contemplated by Order 21, rule 72 (1) of the Schedule to the Code of Civil Procedure, had been obtained and the judgment-debtor sustained substantial injury, he set aside the sale. It is against this order setting aside the sale the present appeal has been filed by the auction-purchaser.

2. When the appeal came up for hearing before a Division Bench of this Court, the learned counsel for the appellant, having regard to the evidence available, did not challenge the findings that the purchase was benami for the decree-holder and no permission contemplated by Order 21, rule 72 (1) of the Code of Civil Procedure, was obtained. However, he contended that the learned Judge, not having given a definite finding on the adequacy or inadequacy of the price fetched at the Court-auction-sale, was not justified in giving a finding that the judgment-debtor sustained a substantial injury and a finding that the judgment-debtor sustained substantial injury as a result of the decree-holder not obtaining permission contemplated under Order 21, rule 72 (1) of the Code of Civil Procedure is necessary for setting aside the sale. In support of this contention, the learned counsel for the appellant relied on a Bench decision of this Court in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1]. The said decision certainly supports the contention of the learned counsel for the appellant, namely, that even when a decree-holder or his benamidar purchases the property in Court-auction-sale without obtaining the permission of the Court under Order 21, rule 72 (2) of the Code of Civil Procedure, the sale cannot be set aside unless it is established that the judgment-debtor or any person interested in the property sustained a substantial injury. But the Division Bench took the view that having regard to the language of Order 21, rule 72 (3) of the Code of Civil Procedure, contrasted with the language of Order 21, rule 90, Code of Civil Procedure, the abovesaid Bench decision, required reconsideration and therefore directed the matter to be placed before a Full Bench and that is how the matter is before us now.

3. We have now to proceed on the basis that there has been a violation of Order 21, rule 72 (1), Code of Civil Procedure, inasmuch as without obtaining the permission of the Court the property has been purchased in Court-auction benami for the benefit of the decree-holder and the judgment-debtor filed the application to set aside the sale on that ground. The question that requires to be considered is whether the judgment-debtor in addition to proving that the purchase at the Court-auction-sale was benami for the decree-holder should further prove that as a result of the decree-holder not obtaining the permission contemplated by Order 21, rule 72 (1), Code of Civil Procedure, he sustained substantial injury.

4. This question has to be now considered against the background of the relevant provisions contained in the Code of Civil Procedure. Order 21, rule 72, Code of Civil Procedure, reads as follows:—

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1. I.L.R. (1955) Mad. 675.

"*Decree-holder not to bid for or buy property without permission.*—(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Where decree-holder purchases, amount of decree may be taken, as payment.—(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder".

A reading of this Rule will clearly show that sub-rule (3) does not require that a Court can set aside the sale under that Rule only if the person who applies for setting aside the sale proves that he has sustained substantial injury by reason of the breach of Order 21, rule 72 (1), Code of Civil Procedure.

5. Now we can contrast the language contained in this Rule, usefully with the language contained in Order 21, rule 90, Code of Civil Procedure. The Rule, after its amendment by Central Act CIV of 1976, reads as follows:

"*Application to set aside sale on ground of irregularity or fraud.*—(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.—The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule".

As far as the requirement that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud, is concerned, there is no change in the language of the relevant provision before its amendment by Central Act CIV of 1976, and after its amendment by the said Central Act. Consequently, to enable a Court to set aside a sale under Order 21, rule 90, Code of Civil Procedure, it must be established and the Court must be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of. In this respect, the language of Order 21, rule 72 (3), Code of Civil Procedure, differs basically from the language of Order 21, rule 90, Code of Civil Procedure. Notwithstanding this basic difference in the language, the question for consideration is whether there is anything on principle to import the restriction provided for in Order 21, rule 90, Code of Civil Procedure into Order 21, rule 72 (3), Code of Civil Procedure. As we pointed out already, the learned counsel for the appellant relied on the decision of a Bench of this Court in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1], referred to already. That Bench did not give any independent reason for coming to the conclusion that before setting aside a sale under Order 21, rule 72 (3), Code of Civil Procedure, the Court should call upon the applicant to satisfy the Court that by reason of the failure on the part of the decree-holder to obtain the permission under Order 21, rule 72 (1), Code of Civil Procedure, the applicant had sustained subs-

1. I.L.R. (1955) Mad. 675.

tantial injury. What the Court did was to assume that such a principle has been laid down by a decision of the Privy Council in *Rai Radha Krishna* v. *Bisheshar Sahay*[1], and therefore it had to follow the same. This is what the Bench says at page 677:

"The second objection that, as the auction-purchasers were benamidars for the decree-holders and that as no leave to bid was obtained, the sale was a nullity as it contravened the provisions of Order 21, rule 72, Civil Procedure Code, also is without force. It is no doubt true that the rule was contravened. But as pointed out by the Judicial Committee in *Rai Radha Krishna* v. *Bisheshar Sahay*[1], the sale is only voidable as the rule itself requires an application by the judgment-debtor to set aside the sale on the ground that no leave to bid was obtained by the decree-holder before the sale. It was further held by the Privy Council that the sale was not only voidable but that it could be set aside only if it were established that the property had not been realized to the best advantage of the judgment-debtor, meaning thereby that unless substantial injury was established a sale could not be set aside on the ground that it contravened the provisions of Order 21, rule 72, Civil Procedure Code".

Since the Bench has simply purported to follow the decision of the Privy Council referred to already, we shall now consider what exactly was the question the Privy Council had to consider in the decision relied on. In that case, a suit was brought in 1914 by one Rani Mahabir Prasad, represented by the appellants before the Privy Council to recover possession of a village alleging that certain execution proceedings in which the village had been sold on 18th April, 1899, were illegal, collusive and fraudulent. The defendant in the suit who was the first respondent before the Privy Council, by his written statement denied the facts alleged, and pleaded that the suit was barred by limitation. The Subordinate Judge found that one Hari Narain, the purchaser at the sale, was merely a *benamidar* for the first respondent, as the plaintiff alleged. He held that the first respondent having purchased after the refusal of an application by him under section 294 of the Code of Civil Procedure, 1882, corresponding to Order 21, rule 72 of the present Code of Civil Procedure, for permission to do so, the sale was void and inoperative. In his view the case was governed by Article 141, and not Article 12, of Schedule I of the Indian Limitation Act, and the suit was therefore not barred by limitation. The decision of the Subordinate Judge was reversed by the High Court on appeal. It was thereafter the matter came before the Privy Council. The Privy Council had to consider two questions, one a question of fact as to whether the Court auction-purchaser was a benamidar for the decree-holder or not and the second a question of limitation as to whether the suit was barred by limitation or not. The Privy Council in its judgment has stated:

"Upon the whole, their Lordships agree with the view of the High Court that it has not been proved that Hari Narain was *benami* for *Bisheshar*. This is sufficient to dispose of the appeal".

Once the Privy Council reached that conclusion, normally no further question could possibly arise because the moment it was held that the Court auction-purchaser was not the benamidar of the decree-holder, there was no violation of Order 21, rule 72 (1) and therefore there could be no question of filing any application under Order 21, rule 72 (3) of the Code of Civil Procedure. Nonetheless the Privy Council went into the question of limitation as that question was considered by the learned Subordinate Judge as well as the High Court. Dealing with that question, for the purpose of finding out as to which was the proper Article of the Schedule to the Indian Limitation that would apply to the suit in question, the Privy Council extracted the provisions of section 294 of the Code of Civil Procedure, 1882 (corresponding to Order 21, rule 72), and proceeded to state:

"Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be

1. 44 M.L.J. 718: L.R. 49 I.A. 312: 16 L.W. 190: (1922) I.L.R. 1 Pat. 733: A.I.R. 1922 P.C. 336.

injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown".

6. This position is well-established and seems to have been accepted by the Subordinate Judge; but in his view the fact that the decree-holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If, then the sale is voidable only and not void, Article 12 in the Limitation Act of 1908, applies, and the suit must be brought within one year. Therefor it was too late".

Article 12 of the First Schedule to the Indian Limitation Act, 1908, which corresponds to Article 99 of the Schedule to the Limitation Act of 1963 runs as follows:—

Description of suit	*Period of Limitation*	*Time from which period begins to run.*
12. To set aside any of the following sales: (*a*) in execution of a decree of a Civil Court.	One year	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.

Article 12 of the First Schedule to the Indian Limitation Act, 1908 dealt with a suit to set aside a sale in execution of a decree of a civil Court. In the Privy Council case, there was actually a suit to set aside the execution sale and therefore the Privy Council was considering the question of limitation with reference thereto. The Privy Council had no occasion to consider what are the requirements that must be fulfilled before a sale can be set aside on an application made by a judgment-debtor or any person interested in the property if the decree-holder purchases the property without obtaining the permission of the Court as contemplated by the law. With reference to the proper Article of the Limitation Act of 1908, that was applicable to the facts of the case before it, the Privy Council had to consider whether the sale held was void or voidable and the Privy Council came to the definite conclusion that the sale was not void but voidable only. Apart from this, the Privy Council had no occasion or necessity to consider any other question. Therefore, we are of the opinion that the Bench of this Court while deciding *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1] was wrong in taking the view that the Privy Council had laid down any such rule with regard to the setting aside of a sale on the ground that the decree-holder had bid at the auction without obtaining the permission of the Court. As a matter of fact, there is a further error in the said Bench decision. We have already pointed out that the language used by the Privy Council is only this:

> "The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage."

The Privy Council did not use the words 'it must be established that the judgment-debtor or any person interested in the property should prove that he had suffered a substantial injury by reason of the failure on the part of the decree-holder to obtain the permission under the law.' The Bench of this Court, in the

1. I.L.R. (1955) Mad. 675.

passage which we have extracted already assumed that the above expression of the Privy Council means that unless substantial injury was established, a sale could not be set aside on the ground that it contravened the provisions of Order 21, rule 72, Code of Civil Procedure. In our opinion, the meaning to be given to the expression "whether the property had been really realised to the best advantage" is totally different from the meaning that should be given to "the judgment-debtor or any person interested in the property sustaining substantial injury". The expression 'substantial injury' is much stronger than the expression used by the Privy Council in the judgment and they cannot be equated. Obviously the learned Judges of this Court who decided the case in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1], were unconsciously influenced by the circumstances mentioned in Order 21, rule 90, Code of Civil Procedure, and imported the language and requirement of that provision into that case and accordingly came to the conclusion which they did.

7. Now, we shall consider the other decisions of this Court as well as other Courts on this point. As far as this Court is concerned, the earliest decision is that reported in *Thathu Naick and others* v. *Kondu Reddi and others*[2]. In that case, the holder of a mortgage decree brought the mortgaged property to sale in execution. He applied to the Court for permission to bid at the sale and the Court granted him permission, fixing an amount as the minimum at which he was to bid. The decree holder purchased the property at sale by Court in the name of a third party for a sum far less than the minimum fixed by the Court and less than the principal amount secured by the mortgage. The sale was confirmed and possession delivered to the purchaser, but actual possession remained with certain parties who had purchased the property from the original mortgagor. In a suit brought by the decree-holder, the auction-purchaser, as plaintiffs in the Court which executed the decree, against the original mortgagor, and the purchasers from them as defendants, the defendants who discovered the fraud of plaintiffs subsequent to the confirmation of sale, contended that the sale to plaintiffs was fraudulent and contrary to the provisions of section 294 of the Code of Civil Procedure, 1882 (corresponding to Order 21, rule 72 of the present Code of Civil Procedure). The matter came before a Bench of this Court consisting of Miller, J., and Abdul Rahim, J., and both the Judges took the view that the confirmation of the sale was no bar to enforcing the right of defendants to set aside the sale, the fraud having been discovered only after such confirmation. However, the two learned Judges differed as to the remedy which was available to the defendants who discovered the fraud. Miller, J., took the view that the defendants were entitled to put forward their case in the written statement itself and have the sale set aside by way of answer to the plaintiff's claim. However, Abdul Rahim, J., took the view that the sale cannot be set aside except on an application by defendants under sections 294 and 244, Civil Procedure Code of 1882, to the Court executing the decree. In view of this difference of opinion between the two Judges, the matter was referred to a third Judge, namely Sankaran Nair, J., who agreed with the view of Miller, J., in this behalf, namely as to the forum and the mode by which the defendants who discovered the fraud should establish the right and have the sale set aside. With reference to the effect of the failure to obtain permission of the Court, the learned Judge observed:

> "The next question is whether the sale should now he upheld. Where a decree-holder purchases property in contravention of the provisions of section 294 and the judgment-debtor seeks to set aside the sale I am of opinion that it is unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree-holder to satisfy the Court that the sale should be confirmed."

The next decision of this Court is that of a Bench of this Court in *Kondapalli Tatireddi* v. *Diduvani Ramachandra Rao and another*[1]. The Bench held:

> "When a sale is set aside under rule 72 on account of the decree-holder's failure to

1. I.L.R. (1955) Mad. 675.
2. (1909) I.L.R. 32 Mad. 242.

1. 13. L.W. 616: A.I.R. 1921 Mad. 402.

obtain permission to bid, it is not necessary to find also that the judgment-debtor sustained substantial loss by 'the sale'."

The next decision of this Court is the one in *Kotta Govindarajulu Chettiar* v. *Sivaramakrishnan*[1]. In that case also, a question, arose whether the purchase in Court-auction without the permission of the Court was a nullity or only voidable. The Bench held that it was only voidable and for this purpose it has relied on a passage in Halsbury's Laws of England, Vol. 28, page 73, paragraph 137 and also the decision of the Privy Council to which we have already drawn attention. Later dealing with the same question, the Bench pointed out:

"Judgment-debtors were entitled to apply to set aside the sale and it would have been so set aside even without proof of damage or any loss if an appropriate application had been put in; but that was not done and the sale was confirmed. It is now too late for the judgment-debtors to have the sale set aside. The order of confirmation has become final and under the circumstances, as far as the judgment-debtors are concerned, the first defendant has got an indefeasible title."

8. Thus the above three decisions of this Court categorically and expressly state that where the decree-holder has purchased the property without the permission of the Court, the judgment-debtor, on an application made by him can have the sale set aside without the judgment-debtor proving that he suffered any damage or loss. Consequently, the decision of the Bench in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[2], is directly opposed to the earlier three decisions referred to above. As we pointed out, independently that decision is also not correct in principle. We may also point out in this behalf that the decision of the Bench of this Court in *Kotta Govindarajulu Chettiar* v. *Sivaramakrishnan*[1], referred to above, actually referred to the decision of the Privy Council on which the Bench in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1] and relied on it but for a different purpose, namely on the question whether the sale was a nullity or only voidable. Thus it is clear that when the Bench decision in *Kotta Govindarajulu Chettiar* v. *Sivaramakrishnan*[2], held that the sale can be set aside without proof of damage or any loss, it did so only after considering the decision of the Privy Council indicating thereby that the Bench did not understand the decision of the Privy Council in the manner in which it was understood by the later Bench in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1]. These are the only decisions of this Court which have been brought to our notice.

9. The learned counsel for the appellant brought to our notice two decisions of the Calcutta High Court. One is in *Mathura Das* v. *Nathuni Lall Mahta*[3]. That was a very short judgment which runs as follows:

"Under the terms of the third para. of section 294 of the Code (Code of 1882), it is discretionary with the Court of execution to set aside a sale in which the decree-holder has purchased without the permission of the Court having been first obtained. In dealing with such a matter, which we regard as an irregularity in conducting the sale, it should be taken into consideration whether any substantial injury has resulted, that is to say, whether, by reason of the decree-holder being the purchaser without permission of the Court previously obtained, an inadequate price has been realised at the sale. The judgment-debtor, appellant, has been unable to show us that the judgment of the lower Court, in holding that there was no such substantial injury is incorrect. There are other irregularities alleged by the appellant in publishing the proclamations; but it is unnecessary to consider them having regard to the finding that no substantial injury has resulted at the sale."

We are of the opinion that this judgment is not of any assistance to support the contention of the learned counsel for the appellant. Here again, a very reading of the judgment will show that the learned Judge treated an application to set aside a sale under the third

1. 65 L.W. 799: (1952) 2 M.L.J. 294: A.I.R. 1953 Mad. 822.
2. I.L.R. (1955) Mad. 675.

1. I.L.R. (1955) Mad. 675.
2. 65 L.W. 799: (1952) 2 M.L.J. 294.
3. (1885) I.L.R. 11 Cal. 731.

para. of section 294 of the Code of Civil Procedure, 1882, equivalent to an application to set aside a sale under Order 21, rule 90 of the present Code of Civil Procedure, and that is why they have imported the conception of 'substantial injury' into the judgment.

10. The other decision of the Calcutta High Court relied on by the learned counsel is in *Jiteswari Dassi* v. *Sudha Krishna Mukherjee*[1]. The relevant passage is as follows:

> "The question that next arises is whether the absence of the leave makes the sale void. Now if a decree-holder purchases without taking the permission contemplated by the Code, the words of sub-section (3) of section 294 of the Code of 1882, and rule 72, Order 21 of the present Code, themselves show that the sale is not void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. This is so even if permission was asked for and refused and considering the question whether the sale should be set aside or not, it will have to be seen whether the property has been realised to the best advantage: (see *Rai Radha Krishna* v. *Bisheshar Sahay*[2])."

Apart from merely repeating the language of the Judicial Committee of the Privy Council, the above judgment does not lay down any principle whatever and therefore this also does not support the contention of the learned counsel for the appellant.

11. No other decision was brought to our notice.

12. As we indicated already, on principle an application to set aside a sale made under Order 21, rule 72 (3) is an independent application independent in the sense that it is different from the application contemplated under Order 21, rule 90, Code of Civil Procedure. When the two sets of provisions provide for two different applications, in the absence of any statutory compulsion, there is no justification whatever to equate the two and import into one set of provisions, the restrictions or limitation imposed in the other set of provisions. As we have pointed out already, Order 21, rule 72 (3) of the Code of Civil Procedure does not refer to the applicant sustaining any substantial injury at all while Order 21, rule 90, Code of Civil Procedure, does refer to it and makes the proof thereof as a condition precedent for setting aside the sale. In view of this basic difference in the language, it is not possible to hold that the considerations applicable to an application under Order 21, rule 90, Code of Civil Procedure, should be applied to an application under Order 21, rule 72 (3) of the Code. As a matter of fact at one stage of the arguments, the learned counsel for the appellant pointed out that even the present application was filed under Order 21, rule 90 of the Code of Civil Procedure. An erroneous statutory provision quoted or cited cannot determine the scope of the rights and liabilities of the parties and the Court will have to decide them in accordance with the correct provisions of law applicable to the facts alleged and established.

13. There is one other vital consideration which must be borne in mind. The requirement that a decree-holder must obtain the permission of the Court before purchasing the property is intended for the benefit of the judgment-debtor in view of the stronger position in which the decree-holder is placed. That is why Order 21, rule 72 (1) use the word 'shall' and not 'may'. That means, the obtaining of the permission of the Court is mandatory before a decree-holder can bid at the auction and purchase the property and if the decree-holder without obtaining such permission or in spite of refusal of such permission bids at the auction and purchases the property, certainly he contravenes a mandatory provision of law. Further the statute has deliberately used the word "express" before permission thereby indicating the stringency of the provision it is making. Such a person cannot be allowed to take advantage of his own illegality by calling upon the judgment-debtor or any other person interested in the property who applies for setting aside the sale to prove that by reason of his illegality, the applicant has suffered substantial injury.

14. Having regard to all the above circumstances we are clearly of the opinion that an application filed under Order 21, rule 72 (3) of the Code of Civil Procedure, is an inde-

1. A.I.R. 1932 Cal. 672.
2. 44 M.L.J. 718: L.R. 49 I.A. 312: (1922) I.L.R. 1 Pat. 733 (P.C.).

pendent application and it has to be dealt with in accordance with the language contained in sub-rule (3) of rule 72 and that sub-rule does not insist that a sale cannot be set aside if it had taken place contrary to the provisions of that rule unless the applicant establishes that he has sustained substantial injury. In view of this we overrule the decision of the Bench of this Court in *Gundu Venkatalingam and others* v. *Kantheti Venkata Ranganayakulu*[1], and confirm the order of the learned Judge setting aside the sale in the present case. The appeal is accordingly dismissed. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, CJ.*

Alamelu Ammal and another .. *Petitioners**

v.

State of Madras and another .. *Respondents.*

Land Acquisition Act (*I of* 1894), *sections* 30 *and* 31—*Acquisition of land—Apportionment of compensation*— A. J *and* N *rival claimants —Two parallel proceedings, one holding* 'N' *had no interest in the concerned lands, and another awarding on a petition by* 'N' *under section* 18 *enhanced compensation—Compensation to be awarded only to whomsoever is interested in the land.*

Certain lands were acquired under the Land Acquisition Act, and since there was a dispute regarding the claim to the compensation, a reference was made to the Court under sections 30 and 31 of the Act. There were three rival claimants, namely, *'A'*, *'J'* and *'N'*. In the reference it was decided that *'N'* did not have any interest in the land and the other two persons will be entitled to compensation. *'N'* preferred an appeal which was dismissed. During the pendency of the reference proceedings, or even before that *'N'* filed a petition under section 18 of the Act for referring the question of compensation to the civil Court and a reference was made. *A* and *J* were not parties to the reference. In that reference the civil Court granted enhanced compensation. Against this grant the State preferred an appeal and it was allowed in part and the compensation awarded by the civil Court was reduced. *"A"* and "J" filed two petitions for payment out and they were dismissed. On revision to the High Court, against the order of dismissal,

Held: In the proceedings which gave rise to the decisions as to which of the claimants had interest in the land all the three *A*, *J* and *N* were parties. In the other parallel proceedings taken by *'N'* claiming enhanced compensation the petitioners herein were not parties. Consequently, the enhanced compensation was awarded at the instance of a person who had no interest in the land. However, so long as the orders directing the payment of enhanced compensation stood the enhanced compensation would be payable to whomsoever was interested in the land and to whomsoever compensation was payable on that account. The fact the enhanced compensation was not directed to be paid at the instance of the petitioners herein would not affect their rights in this behalf because they alone were interested in the land and they alone were entitled to the compensation whether it was enhanced or not.

[*Para*. 2.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court (X Assistant Judge) dated 5th October, 1976 and made in C.M.P. Nos. 7012 and 7013 of 1976 in L.A.C. No. 383 of 1965.

P.R. Krishnan, for Petitioners.

The Additional Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—These are Civil Revision Petitions to revise the order of the learned Tenth Assistant Judge, City Civil Court, Madras, dated 5th day of October, 1976 dismissing C.M.P. Nos. 7012 and 7013 in L.A.C. No. 383 of 1965. Certain lands were acquired by the Government under the Land Acqui-

1. I.L.R. (1935) Mad. 675.

*C.R.P. No. 3191 and 3345 of 1977.

24th January, 1980.

sition Act, and since there was a dispute regarding the claim to the compsaention, a reference was made to the City Civil Court, Madras, under sections 30 and 31 of the Act. The three rival claimants were Alamelu Ammal, Jayammal, the petitioners respectively in the two civil revision petitions, and Nagiah Naidu, the second respondent in the two civil revision petitions. The reference was numbered as L.A.C. No. 509 of 1965. On 11th April, 1967 it was decided in the said L.A C.No. 509 of 1965 that the said Nagiah Naidu did not have any interest in the land and it was only the two petitioners in these petitions who had interest in the land and they alone will be entitled to the compensation. Against this decision, Nagiah Naidu preferred A.S. No. 641 of 1967 before this Court and this Court on 15th November, 1972 dismissed the appeal affirming the conclusion of the City Civil Court that Nagiah Naidu had no interest in the land and the two petitioners herein alone had interest in the land and were entitled to the compensation. During the pendency of L.A.C. No. 509 of 1965, probably even before that, Nagiah Naidu filed a petition under section 18 of the Land Acquisition Act for referring the question of compensation to the civil Court and a reference was made to the civil Court in L.A.C. No. 383 of 1965. In that land acquisition reference, the City Civil Court granted an enhancement on 7th March, 1967. Against this grant of enhanced compensation the State preferred A.S. No.834 of 1967 on 19th October, 1967 impleading the said Nagiah Naidu, as the sole respondent. On 28th November, 1972 A.S. No. 834 of 1967 was disposed of, by allowing the appeal preferred by the State in part. The result of this will be the enhanced compensation granted by the City Civil Court in L.A.C. No. 383 of 1965 was reduced. By that time, as I mentioned already, it had been held both by the City Civil Court and this Court that Nagiah Naidu was not entitled to the compensation as he had no interest in the land. In view of this, the two petitioners herein filed C.M.P. Nos.7012 and 7013 of 1976 for payment out of the enhanced compensation lying in Court deposit. Those petitions were objected to by the Government Pleader. The learned Tenth Assistant Judge, City Civil Court, Madras, upheld the objections and dismissed the petition filed by the two petitioners herein. Hence these two civil revision petitions.

2. The contention advanced by the learned Government Pleader before the City Civil Court and this Court was that the enhanced compensation was asked for and obtained by Nagiah Naidu who was held to be not interested in the land and therefore the petitioners herein cannot claim the enhanced compensation. The question for consideration is whether this contention is correct or not. We have got a peculiar situation arising out of two parallel proceedings. In one proceeding it was decided that Nagiah Naidu was not entitled to the compensation and the petitioners alone are entitled to compensation. To the proceedings which gave rise to this decision the two petitioners herein and Nagiah Naidu were parties. The other parallel proceeding is taken by Nagiah Naidu for claiming enhanced compensation and in that proceeding, the petitioners herein were not made parties. Consequently, the enhanced compensation was awarded at the instance of a person who had no interest in the land. However, as long as the orders directing the payment of enhanced compensation, stands, the enhanced compensation will be payable to whomsoever is interested in the land and to whomsoever the compensation is payable on that account. The fact that the enhanced compensation was not directed to be paid at the instance of the petitioners herein will not affect their right in this behalf because they alone are interested in the land and they alone are entitled to the compensation whether it was enhanced or not. In view of this, I am clearly of the opinion that the two petitioners herein are entitled to the enhanced compensation and therefore the order of the learned Judge, City Civil Court, dismissing the petitions filed by the petitioners herein is not correct. Consequently, the two civil revision petitions are allowed and the orders passed by the learned Tenth Assistant Judge' City Civil Court, Madras, dated 5th October, 1976 are set aside and C.M.P.Nos. 7012 and 7013 of 1976 will stand allowed. There will be no order as to costs in these petitions.

R.S. ——— *Revisions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Venkatachalapathy Odayar .. *Appellant**

v.

Rajalakshmi Ammal .. *Respondent.*

Transfer of Property Act (*IV of* 1882), *section* 106 —*Suit for recovery of possession—Coconut thope—Lease of right to collect the usufructs from—Defendant claiming it to be a lease of land —Transaction, held to be a licence only—Test applicable —Question of issue of notice under section* 106 *of the Transfer of Property Act does not arise.*

The defendant had been specifically given the right to collect the usufructs from 135 Coconut trees situate on the land for the period 1st April, 1969 to 31st March, 1970. At the end of the period, the defendant claimed that he was a lessee of the land and refused to deliver possession of the thope. The plaintiff issued a notice to the defendant to deliver possession of the thope and filed a suit. The defendant claimed that no notice under section 106 of the Transfer of Property Act had been issued by the plaintiff. The trial Court dismissed the suit, but on appeal by the plaintiff the lower appellate Court decreed the suit. The defendant filed a second appeal.

Held: If a right is created in respect of a land for a specified time and the grantee is expected to exploit the land for purposes of his own, then the transaction is one of lease. But where without creating any interest in the land the right to collect the usufructs from the trees standing on the land alone is given, the grantee cannot claim to be a lessee but is only a licencee. Regard should be had to the substance of the transaction and the intention of the parties to determine whether a particular transaction is a lease or a licence. [*Para.* 7.]

Having regard to the fact that the defendant had not been granted any interest in the land and not been authorised to put the land to any particular use, the transaction beween the plaintiff and the defendant could only be taken as a licence. [*Para.* 10.]

*S.A. No. 2170 of 1976. 10*th April*, 1980.

Cases referred to :

Panchapakesan v. *Swaminathan*, (1971) 1 M.L.J. 169 ; *Associated Hotels of India* v. *R.N. Kapoor*, 1960 S.C.J. 453: (1960) 1 S.C.R. 368: A.I.R. 1959 S.C. 1262 ; *Mrs. M.N. Clubwala* v. *Fida Bhusain Saheb*, (1964) 2 S.C.J. 448: (1964) 2 M.L.J. (S.C.) 83 : (1964) 2 An W.R. (S.C.) 83 : (1964) 6 S.C.R. 642 : A.I.R. 1965 S.C. 610 .

Appeal against the decree of the Court of the Subordinate of Kumbakonam in Appeal Suit No. 40 of 1975 preferred against the decree of the Court of the District Munsif of Valangiman at Kumbakonam in Original Suit No. 580 of 1973.

K. Ramamoorthy, for Appellant.

K. Srinivasan and *K. Raghunathan*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in O.S.No. 380 of 1973 on the file of the District Munsif of Valangiman at Kumbakonam is the appellant in this second appeal.

2. The said suit was filed by the respondent herein for recovery of possession of the suit properties on the ground that the defendants took on lease the right to collect the usufructs from 135 coconut trees for the period 1st April, 1969 to 31st March, 1970 for a sum of Rs. 600 and that after the expiry of the said period, the defendant has not surrendered possession of the coconut tope even after the issue of a notice dated 21st February, 1973 calling upon the defendant to deliver possession of the thope.

3. The suit was resisted by the defendant contending that an extent of 2.97 acres was taken on lease by the defendant, that the said leasehold extent originally contained 56 coconut trees, that after taking the land on lease, he had planted 100 coconut saplings at his cost and expense and reared and nurtured them, that he also raised casuarina plantations in the remaining land where there are no coconut trees, that it is not correct to say that the defendant took merely the right to collect the usufructs from the coconut trees without any right in the land, that the defendant being a tenant in respect of 2.97 acres of land and not a mere licensee of the coconut tope, he is entitled to the benefits of the Cultivating Tenants Protection Act and that

in any event, the tenancy in his favour has not been duly terminated as provided in section 106 of the Transfer of Property Act, herein after referred to as the Act.

4. On the above pleadings, the trial Court held that the defendant is not a cultivating tenant of the suit land, but that his lease has not been properly terminated and, therefore, the suit for possession cannot be maintained. In this view, the suit was dismissed. On appeal, the lower appellate Court held that as section 106 of the Act will not apply to agricultural leases in view of section 117 of the Act, the plaintiff is entitled to seek possession even though a proper notice had not been issued in this case terminating the lease under section 106 of the Act. In this view, the trial Court's decree and judgment were reversed and the plaintiff was granted a decree for possession with future mense profits from the date of plaint till the date of delivery of possession.

5. In this second appeal, the defendant seeks to challenge the finding given by the lower appellate Court that as the lease is one for agricultural purposes. Section 106 of the Act will not apply contending that the suit for recovery of possession of a leasehold property is not maintainable unless there is a prior notice terminating the lease as provided in section 106 of the Act.

6. After going through the actual evidence in the case, I am of the view that both the Courts below have missed the real question that arises in this case. The trial Court as well as the lower appellate Court have proceeded on the basis that what was granted by the plaintiff to the defendant was a lease of land. However the facts as established, indicate that the lease in favour of the defendant was only a right to collect the usufructs from the coconut trees for a period of one year. As a matter of fact when the defendant filed an application before the Record Officer for recording his name as a cultivating tenant, that application was rejected on the ground that what was granted to the defendant was a right to collect the usufructs and there was no lease of the land, and therefore, he cannot be taken to be a tenant entitled to the benefit of the Tenancy Rights Act. The said order of the Record Officer has been marked as Exhibit A-1. The same was confirmed by the Sub-Collector, Kumbakonam, on appeal and his order has been marked as Exhibit A-2. The said order was again confirmed in a revision by the District Revenue Officer, Thanjavur, whose order has been marked as Exhibit A-6. Apart from these decisions rendered by the authorities constituted under the Tenancy Rights Act the documents under which similar right granted earlier had been marked as Exhibits A-7 and A-8. These documents indicate that the defendant was given the right to collect the usufructs from 133 coconut trees situate in 2 acres 97 cents for a period of one year and that after the said period, the trees will be handed over to the plaintiff. The said documents do not confer on the defendant any right in the land. The answer to the question whether there was a lease of the land or a licence to collect the usufructs from the coconut trees standing on the land has to be gathered from Exhibits A-7 and A-8 which are admittedly the prior documents evidencing earlier similar transactions between the plaintiff and the defendant. Therefore, the Courts below should have first gone into the question as to what was granted to the defendant was a lease or a licence and only when it is found that it is a lease, the question of applicability of section 106 of the Act should have been gone into. Without going into the nature of the transaction, they have assumed that the transaction is a lease and proceeded to decide the question of applicability of section 106 of the Act. I am of the view that on the facts of the present case, the basic question that has to be decided is, whether the transaction between the plaintiff and the defendant is a lease, as contended by the defendant or a licence, as contended by the plaintiff.

7. To decide whether a particular transaction is one of licence or lease, Courts have applied various tests. If a right is created in respect of a land for a specified time and the grantee is expected to exploit the land for purposes of his own, then the transaction can be said to be one of lease. But, where without creating any interest in the land the right to collect the usufructs from the trees standing on the land alone is given, the grantee cannot claim to be a lessee, he can be said to be a licensee only. In determining whether a particular transaction is a lease or a licence, we have to be guided by the substance of the deed evidencing the transaction and the intention of the parties.

8. In *Panchapakesan* v. *Swaminathan*[1], this Court has pointed out the distinction between a lease and a licence. It was pointed out in that case that the distinction between a lease and a licence is well-established, that if there is a document, the substance of the document must be preferred to the form, that the real test is the intention of the parties whether they intended to create a lease or a licence, that if the document creates an interest in the property, it is a lease, but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence. The distinction between a lease and licence had been pointed out by the Supreme Court in *Associated Hotels of India* v. *R.N. Kapoor*[2]. In the said decision, it was pointed out that the real test is the intention of the parties and that if the document creates an interest in the property, it is a lease, but if it merely permits another to make use of the property, it is a licence. In *M. N. Clubwaia* v. *Fida Hhusain Saheb*[3], the Supreme Court again pointed out that the intention of the parties is the decisive consideration for finding out whether the agreement between the parties created a relationship of landlord and tenant or merely that of licensor and licensee, that the intention of the parties has to be ascertained on a consideration of all the relevant provisions in the document and that in the absence of a formal document, the intention must be inferred from the circumstances and conduct of the parties.

9. Applying the principles laid down in those cases for determining whether a particular transaction is a licence or a lease, to the facts of the present case. I am of the view that the transaction between the plaintiff and the defendant can only be treated as a licence. If it is considered as a licence, there is no question of termination of the tenancy as required under section 106 of the Act, and a mere revocation of the licence is sufficient, which has been done in this case under Exhibit A-3.

10. In this case, the defendant has been specifically given the right to collect the usufructs from the 135 coconut trees situate on the land. The case of the defendant is not that any right to cultivate the land as such had been given to him. As a matter of fact, the earlier documents, Exhibits A-7 and A-8 evidencing similar transactions do not create any interest in the land in favour of the defendant and the only right granted to him was to collect the usufructs from the coconut trees for a period of one year. Having regard to the fact that the defendant has not been granted any interest in the land and has not been authorised to put the land to any particular use, the transaction between the plaintiff and the defendant can only be taken as a licence. It also does not appear that an exclusive possession of the land has been given to the defendant, though the defendant has been asked to attend to the watering of the coconut trees and also to attend to the fencing of the land. It is only for the purpose of protecting his own interest and to secure the usufructs from the coconut trees to him. As I am of the view that the transaction between the plaintiff and the defendant is a licence, there is no question of issuing a notice of termination as contemplated in section 106 of the Act. In this view of the matter, the decree of the lower appellate Court directing delivery of possession, has to be confirmed, but on a different ground.

11. The second appeal, therefore, fails and it is dismissed. No costs.

S.J. —— *Appeal dismissed.*

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1. (1971) 1 M.L.J. 169.
2. 1960 S.C.J. 453: (1963) 1 S.C.R. 368 : A.I.R. 1959 S.C. 1262.
3. (1964) 2 S.C.J. 448: (1964) 2 M.L.J. (S.C.) 83: (1964) 2 An. W.R. (S.C.) 83: (1964) 6 S.C.R. 642: A.I.R. 1965 S.C. 610.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Sathiadev, J.*

M. Kandaswamy .. *Petitioner**

v.

Sowrirajan .. *Respondent.*

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), *sections* 3 (4) (a) *and* 6 (b)—*Civil Procedure Code* (*V of* 1908), *section* 115—*Applicability.*

The tenant was the petitioner herein against whom a petition was filed under section 3 (4) (*a*) of Act XXV of 1955, for eviction for non-payment of lease rent. The Authority held that there was no *bona fide* reason to grant further time and that the tenant wanted to drag on the matter wilfully. He ordered eviction since the tenant had not paid lease rent in spite of opportunities given.

Held: In this case, the Revenue Court had taken note of the landlord agreeing to one half of the amount being remitted. The landlord appraised the Court of his properties being distrained for non-payment of land revenue. On the second occasion the landlord reported to the Revenue Court of his movables having been already distrained. In these circumstances it cannot still be held that the Revenue Court had failed to exercise its jurisdiction in holding that the tenant had wilfully avoided paying the rent knowing the circumstances in which the landlord was placed and therefore, the request made by him for further adjournment was not *bona fide.* When a Revenue Court thus takes into account the relevant circumstances and also exercises jurisdiction reasonably after granting adjournments as are necessary for part-payments to be made, and when it comes to the ultimate conclusion that inspite of the indulgence shown the tenant is wilfully avoiding payment of rent, it cannot in any sense be held that it had failed to exercise the jurisdiction vested in it under Act XXV of 1955. It is not for the High Court to go into the question of finding out whether the subsequent payment made during the pendency of the civil revision petition, would by itself show that the Revenue Court either wrongly exercised its jurisdiction or failed to exercise its jurisdiction. In this case, on the day when the order was passed, there were justifiable circumstances for the Revenue Court, to hold that the tenant was the person who had wilfully avoided payment and he had not only dragged on the matter but he had not also given any *bona fide* reason for grant of any further time. In this view, this civil revision petition was liable to be dismissed. [*Para.* 6.]

Cases referred to :—

Mahalinga Voikkaran v. *P. R. S. Sellathammal,* (1972) 85 L. W. 376; *Sivasankara Devarayar* v. (*Minor*) *Prakash,* (1979) T.L.N.J. 290.

Petition under section 6-B of. The Madras Cultivating Tenants Protection Act as amended, read with section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Special Deputy Collector (Revenue Court) Tiruvarur dated 5th December, 1979 and made in P.No. 138 of 1970.

Ganesan, for Petitioner.

K. Raman, for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is filed under section 115, Civil Procedure Code, and under section 6 (*b*) of Tamil Nadu Cultivating Tenants Protection Act XXV of 1955 against the order passed by the Special Deputy Collector and Presiding Officer of Tiruvarur in P. No. 138 of 1979 on 5th December, 1979. The tenant is the petitioner herein against whom a petition was filed under section 3 (4) (*a*) of Act XXV of

*C.R.P. No. 56 of 1980. *29th February,* 1980.

1955 for evicting him for non-payment of lease rent for Fasli 1388. The Authority held that this is a case where "the tenant (intended) to drag the matter wilfully and there is no *bona fide* reason to grant any further time "and hence it is ordered the tenant to be evicted since he has not paid the lease rent inspite of opportunities given" Mr. Ganesan, counsel for the petitioner, contends that the refusal to grant further time beyond the two adjournments given earlier, being unreasonable, the Authority had failed to exercise the jurisdiction vested in it and hence, this Court during the pendency of the Civil Revision Petition can not only take note of the subsequent payment of rent made and also hold that such a payment made pending disposal of the Civil Revision Petition would tantamount to remittance of rent within the time fixed by the Authority. He also contends that failure to grant further time had resulted in gross prejudice to the tenant resulting in eviction and hence the order of eviction is unsound and unsustainable in law. He also relies upon the decision of this Court rendered in *Mahalinga Voikkaran* v. *P.R.S. Sellathammal*[1] to contend that a Civil Revision Petition is a continuation of the petition filed under Act XXV of 1955 and therefore, this Court has ample jurisdiction to give an opportunity to the tenant to pay the arrears during the pendency of the Civil Revision Petition and if such a payment is made, it would be sufficient compliance of the provisions of the Act and it would in turn result in setting aside the order of eviction.

2. Mr. Raman, counsel for the respondent/landlord in turn relies upon the decision rendered in *Sivasankara Devarayar* v. (*Minor*) *Prakash by Guardian*[2], wherein, it has been stated that where a revision can be considered as a continuation of the proceedings under Act XXV of 1955 initiated before the Revenue Court is an aspect on which there is still a grave doubt, and that there has been a compliance of the orders passed during the pendency of the Civil Revision Petition, cannot be taken into account for finding out whether there has been a failure to pay rent on time or not. The compliance of interim order pending disposal of the Civil Revision Petition is no ground to hold that the order of the Revenue Court has been complied.

3. In this case, the preliminary order was passed on 29th October, 1979, directing the tenant to deposit a sum of Rs. 692.70 together with costs of Rs.40 on or before 21st November, 1979. The tenant had earlier filed a vakalat through counsel on 16th August, 1979; but no enquiry could be conducted till 22nd October, 1979, and it is only thereafter, by mutual consent of the landlord and the tenant, the claim of 61 kalams was restricted to only thirty kalams for Fasli 1388. The tenant agreed to pay the value of this quantity and accordingly, an order was passed granting time till 21st November, 1979, for payment of the amount. On 21st November, 1979, the tenant paid only Rs. 150 and asked for further time of two months. But this was objected to by the landlord by stating that the properties are being distrained for arrears of Land Revenue and therefore a longer time cannot be granted. This resulted in the Revenue Court fixing 5th December, 1979, as a date by which the balance of the amount was to be paid. Again on 5th December, 1979, the tenant paid only Rs. 50 and pleaded for further extension of time. On this date, the landlord stated that already his movables have been distrained and that he had no money to pay even the public demands. It is in this background, the Revenue Court came to the conclusion that the tenant wanted to drag the matter wilfully and there is no *bona fide* reason to grant any further time.

1. (1972) 85 L.W. 376.
2. (1979) T.L.N.J. 290.

4. The contention of Mr. Ganesan is that it was only the inability of the tenant which prevented him from paying the value of the restricted claim of 30 kalams and therefore, the conclusion that there was no *bona fide* in requesting for further time being erroneous, the Revenue Court has failed to exercise the jurisdiction vested in it.

5. No doubt this Court in *Mahalinga Voikkaran* v. *P. R. S. Seethammal*[1] has held that this Court while exercising powers under section 115, Civil Procedure Code, has ample powers to give relief to parties and when such wide powers are exercised, this Court can also enable a tenant to pay the arrears of rent which, he had failed to pay by the time fixed by the Revenue Court. The learned Judge has held that it depends upon the proper circumstances made out for such a relief to be granted in the Civil Revision Petition. It cannot be denied that the Revenue Court has the jurisdiction, taking into account the circumstances of the case to give such time as may be required for a tenant to pay the rent. Equally, he has jurisdiction to decide as to whether the tenant was resorting to protraction of the proceedings and his failure to payment, is *bona fide* or not.

6. In this case, when the Revenue Court had taken note of the landlord agreeing for one half of the amount to be remitted, and who had appraised the Court of his properties being distrained for non-payment of the land revenue and on the second occasion reporting to the Revenue Court of his movables having been already distrained, it cannot still be held that the Revenue Court had failed to exercise its jurisdiction in holding that the tenant had wilfully avoided paying the rent knowing the circumstances in which the landlord is placed and therefore, the request made by him for further adjournment is not *bona fide*. When a Revenue Court thus takes into account the relevant circumstances and also exercises jurisdiction reasonably after granting such adjournments as are necessary for part payments to be made, and when it comes to the ultimate conclusion, that inspite of the indulgence shown, the tenant is wilfully avoiding payment of rent, it cannot in any sense he hold that it had failed to exercise the jurisdiction vested in its under Act XXV of 1955. It is not for this Court to go into the question of finding out whether the subsequent payment made during the pendency of the Civil Revision Petition, would by itself show that the Revenue Court had either wrongly execised its jurisdiction or failed to exercise its jurisdiction. Subsequent payments, cannot be taken into account for holding as to what had been committed by the time the order was passed by the Revenue Court. In this case, on the day when the order was passed, there were justifiable circumstances for the Revenue Court to hold that the tenant is the person who has wilfully avoided payment and he had not only dragged on the matter but he had not also given any *bona fide* reason for grant of any further time. In this view, this Civil Revision Petition stands dismissed. No costs.

R. S. —— *Revision dismissed.*

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1. (1972) 85 L.W. 376.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and S. Swamikkannu, JJ.*

The State of Tamil Nadu through the Director of Fire Service ... *Appellant**

v.

M. N. Shansudeen and others ... *Respondents.*

Motor accidents claim—Collision between motor cycle and Madras Fire Service Ambulance Van—Van carrying a person who had been stabbed for emergent treatment in the Government Hospital—Defence of vehicle being used in the course of exercise of sovereign function—State whether entitled to claim immunity from payment of compensation.

Held: The transporting of a patient to the hospital can be done even by private individuals also and when it is not the case of the State that the transport of patients can only be done by the Government in their vehicles, it cannot be said that the work of transporting a person who had been stabbed, to the hospital is a sovereign function. As a Welfare State it may undertake many ameliorative measures but that cannot make every such work undertaken by the State a sovereign function. If an act is to be taken as an act done in the course of the exercise of a sovereign function, it should be one, which cannot be expected to be performed by any private individual but which the State alone is authorised to perform. In this case, it cannot be said that the transport of the person, who had been stabbed, in the van to the hospital is a sovereign function at all. For one thing there is no statutory rule or Government order imposing on the State a duty of carrying patients from one place to another in Government vehicles, and preventing others doing those acts. Having regard to these it cannot be said that the State is immune from liability in respect of the accident caused by the driver of the Fire Service Ambulance Van, by his rash and negligent driving. [*Para. 17.*]

*A. A. O. No. 2 8 of 1977.

22nd July, 1980.

Cases referred to :—

Kasturi Lal v. *State of Uttar Pradesh*, (1965) M. L. J. (Crl.) 571 : (1965) 2 An. W.R. (S C.) 15 : (1965) 2 M. L. J. (S C.) 15 : (1965) 2 S. C. J. 318 : (1965) 1 S C R. 375 : A. I. R. 1965 S. C. 1039 ; *The Highways Department of South Arcot* v. *Vedanthachariar*, (1972) 1 M. L. J. 71: 85 L. W. 69 : (1972) A. C J 108: A. I. R. 1972 Mad. 148 ; *Thangarajan* v. *Union of India*, (1974) 2 M. L. J. 288 : 87 L. W. 521 : A. I. R. 1975 Mad. 32; *Bakshi Amrik Singh* v. *Union of India*, (1974) A. C. J. 105 (P. & H.) ; *Peninsular and Oriental Steam Navigation Co* v. *Secretary of State for India-in-Council*, (1868-69) 5 Bom. H. C. R. 1 ; *Shyam Sundar* v. *State of Rajasthan*, (1974) 2 S C J. 317 : (1974) 3 S. C. R. 549 : (1974) A. C. J. 296 : A I. R. 1974 S. C. 890; *Union of India* v *Smt. Jasso*, I. L. R. (1962) 1 Punj 708 : 64 P. L. R. 318 : A. I R. 1962 Punj 315 (F B.) ; *Satya Wati* v. *Union of India*, A. I R. 1967 Del. 98 ; *Union of India* v. *Sugarabai*, A I. R. 1969 Bom. 13; *Roop Lal* v. *Union of India*, A. I. R. 1972 J. & K 22; *Union of India* v. *Savita Sharma*, A. I. R. 1979 J & K 6.

Appeal against the order of the Court of the Principal Subordinate Judge (Motor Accidents Claims Tribunal), Madurai, dated 18th February, 1976 and made in M A. C. O. P. No. 160 of 1971.

N. R. Chandran, Assistant Government Pleader, on behalf of Appellant.

T. R. Mani, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—This appeal arises out of an award passed by the Motor Accidents Claims Tribunal, Madurai, in M. A. C. O. P. No. 160 of 1971 on its file.

2. On 2nd December, 1970 at about 3.45 P. M. one Naina Mohammed was going in his motor cycle, M. D. A. 7826 from east to west in Tamil Sangam Road, Madurai Town, with three boys on the pillion of the motor cycle. At that stage, the Madras Fire Service Ambulance van, M. S. M. 2103 driven by one Diraviam Paul and owned by the State of Tamil Nadu through the Director of Fire Services, came in the opposite direction and it hit against the motor cycle violently, with the result all the riders in the motor cycle were thrown away resulting in serious injuries. The injuries sustained by Naina Mohammed proved fatal later on at 3 A. M, on 3rd December, 1970 when he was carried to the hospital for treatment. Alleging that the driver of the van drove it in a rash and negligent manner and that the accident was solely due to his driving the vehicle on the wrong side of the road, the widow and the children of the deceased Naina Mohammed filed the claim petition, claiming a compensation of Rs. 60,000.

3. The respondents in the claim petition, the driver of the van as well as the State of Madras, resisted the claim contending that the van was driven in a slow and cautious manner on the correct side of the road, that the deceased Naina Mohammed came in a motor cycle at a high speed and on the wrong side of the road, that he drove the motor cycle in a reckless, negligent and careless manner, and dashed against the van, that therefore, the accident cannot be taken to be due to the fault of the driver of the van, and that therefore the respondents are not liable to pay any compensation to the claimants.

4. The Tribunal, on these rival contentions, took up the following two points for consideration :

1. Whether the accident was due to the rash and negligent driving of the Ambulance Van, M. S. M. 2103 by 1st respondent?

2. Whether the petitioners are entitled to claim any damages from the respondents, and if so, to what amount?

5. Before the Tribunal, P. W. 3 an eye witness was examined. He is having a workshop in Tamil Sangam Road, very near the place of accident. He has deposed that on the day of occurrence, Naina Mohammed came in a motor cycle with three boys on the pillion at a slow speed, that at that time, the ambulance van came very fast from the opposite direction and dashed against the motor cycle, that the actual impact was on the southern side of the road, about six or seven feet from the southern platform and that he rushed to the place of accident immediately. The evidence of P. W. 3 has not been effectively challenged in cross-examination. No motive also has been alleged against P. W. 3 as to why he should give evidence falsely in favour of the claimants and against the respondents. He is an independent witness and he has no axe to grind in this matter. The evidence of P. W. 3, is also corroborated by the other factors, such as the situation of the vehicle at the time of the accident *i. e.*, on the southern side of the road and the speed with which the van was driven. The Tribunal therefore held that the accident was due to the rash and negligent driving of the van.

6. On the question of compensation, the Tribunal held that the deceased was earning a sum of Rs. 300 per month from his business and that he would have contributed a sum of Rs. 150 per month to his family. Thus. the annual dependency was taken to be Rs. 1,800. Then taking into account the age of the deceased at the time of the accident, which was 48 years, the loss of earnings for a period of 12 years was determined at Rs. 21,600. The Tribunal therefore, fixed the said sum as a fair and reasonable compensation for the loss of pecuniary benefits. Apart from this, the Tribunal awarded a sum of Rs. 1,400 as compensation for pain and suffering. Thus, the Tribunal in all awarded a sum of Rs. 23,000 as compensation.

7. This award of the Tribunal has been challenged in this appeal filed by the State, both on merits as well as on the quantum of compensation.

8. Though the learned Government Pleader vehemently argued that the van driver was not at all rash and negligent, on the facts and circumstances proved in this case, we find that there is enough material on record to establish his rashness and negligence.

As pointed out by the Tribunal, on the facts of this case, the doctrine of *res ipsa loquitur* could easily be invoked. Apart from the said doctrine, there is the evidence of the eye witness, P. W. 3, which is categoric that the van driver was driving the vehicle rashly and it is because of his rashness and negligence, the accident took place. We do not therefore see any justification for interference with the findings of the Tribunal that the accident was due to the rash and negligent driving of the Ambulance Van by its driver.

9. The learned Government Pleader, has however raised a legal plea that having regard to the purpose for which the vehicle had been used at the time of the accident, the State is entitled to claim immunity from payment of compensation, for the reason that the vehicle has been used in the course of the exercise of a sovereign function. Though such a defence was not taken before the Tribunal and the Tribunal had no opportunity to deal with such a defence, we allowed the learned counsel to substantiate that legal plea. According to the learned counsel, the van, which was involved in the accident in this case though belonged to the Fire Service Department, has been permitted by the State to be used for rescuing human beings and animals, trapped under collapsed buildings and structures, and for carrying patients to and from the hospital etc. The learned counsel has referred to Part I of the Tamil Nadu Fire Service Manual to show that though the Ambulance is primarily intended to be used at fires and at other emergencies, it is also made available to the public for removal of patients from or to hospitals and dispensaries, Government and private, provided it is within the State and that it can also be used for removing patients from one place to another on production of a Doctor's certificate that an ambulance is necessary for that purpose. The learned counsel also referred to the Government Order, in G. O. Ms. No. 2802, Home, dated 4th October, 1967, authorising the separation of Fire Service branch from the Police Department. and vesting the powers to maintain the Ambulance Vans with the Fire Service Department.

10. It is in evidence in this case that the Fire Service Van was being used for carrying a person, who had been stabbed for emergent treatment to the Erskine Hospital, Madurai. The contention of the learned Government Pleader that the Fire Service Ambulance Van has been authorised to carry such victims for treatment to the hospital free of charge and that the Fire Service personnel are also bound to attend to the work of carrying victims to and from the hospital in case of emergencies. But still the question is, whether such a purpose, for which the van was used, has been done in the course of exercise of a sovereign function by the driver of the van.

11. The learned Government Pleader refers to the decision of the Supreme Court in *Kasturi Lal* v. *State of Uttar Pradesh*[1], the decisions of the Madras High Court in *The Highways Department of South Arcot* v. *Vedanthachariar*[2] and in *Thangarajan* v. *Union of India*[3] and also to a decision of the Punjab and Haryana High Court in *Bakshi Amrik Singh* v. *Union of India*[4], as supporting his stand. In the first case above referred to, the Supreme Court while dealing with a case of seizure of gold and silver suspected to have been stolen, under the provisions of Uttar Pradesh Police Regulations and of the disposal of the property seized, has found that after the seizure, the gold and silver seized were entrusted to certain police personnel, who secreted the same and became scarce. Ultimately, when the person from whom the gold and silver had been seized claimed the return of the articles seized a plea was taken that the articles are not available for return. At that stage, a charge of negligence was made as against the police officers, who seized the gold and silver, in entrusting the same after seizure to a person without properly ensuring for their safe custody, and they were asked to make good the loss for the negligent performance of their duties. It is in those circumstances, the State of Uttar Pradesh maintaining the police force raised the plea that the State is not liable for the

1. (1965) M. L. J. (Crl.) 571 : (1965) 2 An. W.R. (S. C.) 15 : (1 6') 2 M. L. J. (S. C.) 15 : (965) 2 S. C. J. 318 : (1965) 1 S. C. R. 375 . A. I. R. 1965 S. C. 1039
2. (1972) A. C J. 108: (19) 1 M. L. J. 71: 85 L W 69: A. I. R. 1972 Mad 148.
3. (1974) 2 M. L. J. 288: 87 L. W. 521: A. I. R. 1975 Mad. 32.
4. (1974) A. C. J. (P. and H.) 105.

tortious acts of its servants committed in exercise of the statutory functions delegated to them by the Government. Dealing with this plea of immunity, the Supreme Court has pointed out that the act of negligence was committed by the police officers while dealing with the property of the person arrested in that case, which they had seized in exercise of their statutory powers that the power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute that in that last analysis, they are powers which can be properly characterised as sovereign powers; and so the act which gave rise to the claim for damages in that case had been committed by the employee of the State in the course of its employment but that the employment in question being of the category which can claim the special characteristic of sovereign power, the claim could not be sustained.

The Supreme Court referred to with approval the observations of Peacock, CJ., in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India-in-Council*[1], which has been taken to be a leading authority on the point. The other decisions referred to above, merely follow the principle laid down in *Kasturi Lal* v. *State of Uttar Pradesh*[2], and therefore, it is unnecessary to deal with them separately.

12. However, it is seen the Supreme Court has dealt with this question once again in *Shyam Sundar* v. *State of Rajasthan*[3]. In that case, the question was whether the State could claim immunity in respect of an accident in which a truck engaged in famine relief work was involved. It was contended that the famine work is a sovereign function of the State and therefore it is entitled to plead immunity in respect of the accident caused by the rash and negligent driving of the truck. In support of the plea of immunity, reliance was placed before the Supreme Court on the decision in *Kasturi Lal* v. *State of Uttar Pradesh*[2]. After considering the principle laid down in the earlier case, the Supreme Court held that the liability of the State for a tort committed by its servants in the course of exercise of their duties, would depend upon whether the employment was of the character, which claimed the special characteristics of sovereign power, that the immunity of the State for injuries on its citizens committed in the exercise of what are called the sovereign functions is based on the theory that the King can do no wrong, but that in modern times, the said theory cannot have any moral justification. The learned Judges observed that:

> "Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State".

13. However, without going into the correctness or otherwise of the decision rendered by it in *Kasturi Lal* v. *State of Uttar Pradesh*[1], it went into the question as to whether the famine relief work is of the category, which would claim the special characteristics of sovereign powers and found that it is a work, which can be and is being undertaken by private individuals as well and there is nothing peculiar about it, so that it might be said that the State alone can legitimately undertake the work. Thus, one of the tests laid down by the Supreme Court in this case is that if an act, which is alleged to have been carried on by the State in exercise of the sovereign functions, could be carried on normally by private individuals as well, then the act cannot be said to have been done in this course of exercise of sovereign functions.

14. This is the view taken in some of the earlier decisions also. The earliest one is a

1. (1868-69) 5 Bom. H. C. R. App. A-1.
2. (1965) 2 M. L. J. (S. C.) 15 : (1965) 2 An.W.R. (S. C.) 15 : (1965) M. L. J. (Crl) 571 : (1965) 2 S.C.J. 318 : (1965) 1 S. C. R. 375 : A. I. R. 1965 S. C. 1039.
3. (1974) 2 S.C.J. 317 : (1974) A.C.J. 296 : (1974) 3 S. C. R 549 : A. I. R. 1974 S. C. 890.

1. (1965) 2 M. L. J. (S. C.) 15 : (1965) 2 An.W.R. (S. C.) 15 : (1965) M. L.J. (Crl.) 571 : (1965) 2 S.C.J. 318 : (1965) 1 S. C. R. 375 : A. I. R. (1965) S. C. 1039.

decision in *Union of India* v. *Smt. Jasso*[1]. In this case, coal was carried by a military truck from a place to the Army Unit Headquarters building at Simla driven by an army driver. On the way, the vehicle met with an accident and the accident resulted in the death of one Rakha Ram. His dependants instituted a suit for recovery of Rs 20,000 against the Union of India, alleging that the death of the deceased was due to the rash and negligent driving of the military vehicle by its driver and that therefore, the Union of India was liable to pay the damages caused by the rashness and negligence by its employee. The Union of India raised the plea that the military truck was used in the course of the exercise of the sovereign functions and therefore, the State is entitled to claim immunity in respect of the said accident caused by the negligence of the driver of the vehicle. The Full Bench of that Court took the view that there is a great and clear distinction between acts done in exercise of what are usually called sovereign powers and acts done in the conduct of undertakings which may as well be carried on by private individuals, that applying that test, the transport of coal from some depot or store to the Headquarters building of the Army at Simla could be undertaken even by a contractor or by a private individual and that the mere fact that the Government had chosen to undertake the transport by its army truck and the driver of the vehicle was a military employee, cannot make any difference to the liability of the Government for damages for the tortious acts of the driver. In this view, the Full Bench rejected the plea based on the State's immunity for the acts done in the course of exercise of sovereign functions by an employee of the Government. The same view was taken in the decision in *Satya Wati* v *Union of India*[2] and in *Union of India* v. *Sugrabai*[3].

15. In the decision in *Roop Lal* v. *Union of India*[4] the military jawans in the employment of the Union of India lifted the driftwood belonging to a third party and carried it through military vehicles for the purposes of camp fire and the fuel was used by them for their requirements. The question was whether the wrongful act done by the military jawans in lifting the firewood belonging to a third party for using them for their purposes, will be protected by the immunity based on sovereign functions. The High Court of Jammu and Kashmir found that the carrying of the driftwood by the jawans is not an act done in the course of their performance of military duties or for the purpose of any sovereign function and therefore no immunity can be claimed in respect of such a tortious act.

1. (1962) I. L. R. 1 Punj. 703: 64 P. L. R. 318: A. I. R. 1962 Punj. 315 (F. B.).
2. A. I. R. 1967 Del. 98.
3. A. I. R. 1969 Bom. 13.
4. A. I. R. 1979 J & K. 6.

16. In *Union of India* v. *Savita Sharma*[1], a military truck was proceeding to the railway station for picking up the jawans. At that stage, the vehicle met with an accident and collided with a private tempo resulting in the occupant of the tempo being injured. When the injured person filed a claim for damages against the Government, the Union of India took up the plea that the truck was being utilised for the purpose of transporting jawans and therefore, it should be taken that the driving of such a vehicle was in the course of performance of delegated sovereign functions. Rejecting that plea, the Court held that the jawans could have been transported even in a private bus or in a truck or in any other vehicle and that even if the driver is taken to have performed a statutory duty in transporting the jawans from the railway station to the army unit headquarters, that alone cannot entitle the Union of India, in whose employment the driver was, to claim that the act was performed in exercise of the delegated sovereign powers. It was pointed out by the Court that there is no rule or law that the jawans should be transported only in military trucks and that even if there could be any such rule or law, that would make hardly any difference as the act of transporting jawans from one place to another in the ultimate analysis could be performed by private individuals also in their vehicles and that therefore, only if it was shown that such an act could not have been performed by private individuals, the said act can be said to be performed in exercise, of delegated sovereign powers.

1. A. I. R. 1979 J. & K. 6.

17. Though the learned counsel on either side referred to a large number of decisions, dealing generally with the State's immunity in respect of its sovereign functions, we do not think it necessary to deal with them in detail, as the Supreme Court has clearly laid down the principle of law relating to the said plea of immunity in *Kasturi Lal* v. *State of Uttar Pradesh*[1]. As we are of the view that on the facts of this case, the transporting of the patient to the hospital can be done even by private individuals also and that when it is not the case of the State that the transport of the patients can only be done by the Government in their vehicles, it cannot be said that the work of transporting a person, who had been stabbed, to the hospital is a sovereign function. As a welfare State it may undertake many ameliorative measures, but that cannot make every such work undertaken by the State a sovereign function. As pointed out in the various decisions referred to above, if an act is to be taken as an act done in the course of the exercise of a sovereign function, it should be one, which cannot be expected to be performed by any private individual but which the State alone is authorised to perform. In this case, it cannot be said that the transport of the person who had been stabbed, in the van to the hospital is a sovereign function at all. For one thing there is no statutory rule or Government order imposing on the State a duty of carrying patients from one place to another in Government vehicles, and preventing others doing those acts. Having regard to these circumstances, we are not inclined to uphold the legal plea raised by the learned Government Pleader that the State is immune from the liability in respect of the accident caused by the driver of the Fire Service Ambulance van, by his rash and negligent driving.

18. Now coming to the question of compensation, the learned Government Pleader points out that after computing the loss of pecuniary benefit at Rs. 21,600 for 12 years, it has not given any reduction in allowance for the benefit of lump sum payment. But it is seen that the deceased was aged 48 years at the time of the accident and the Tribunal has adopted 12 years as the years of purchase as the basis. Once the 12 years purchase is taken as the basis, there is no question of any deduction being made for lump sum payment. It is only when the pecuniary loss is determined on the basis of the longevity of the deceased, then any deduction is possible for lump sum payment. In this view, we do not see any justification for interfering with the quantum of compensation fixed by the Tribunal.

19. The result is, the appeal fails and is dismissed. But there will be no order as to costs.

R. S. —— *Appeal dismissed.*

1. (1965) M L.J. (Crl.) 571 : (1965) 2 S. C. J. 318: A. I. R. 1965 S. C. 1039.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *M. M. Ismail, CJ. and S. Nainar Sundaram, J.*

K T. Parasuramaswami Gounder and another .... *Appellants**

v.

The Land Commissioner, Board of Revenue, Madras and another ... *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) and (Tamil Nadu Act XXX of 1963), section 50 (3) —Lands in respect of which patta was granted, whether to be taken into account as part of the holding for determining ceiling.

Section 50 (3) of Tamil Nadu Act XXX of 1963 has created an express fiction that independent of the date of the grant of ryotwari

*W. A. Nos. 273 and 174 of 1980.

22nd *July*, 1980.

patta to a person under the provisions of the Act the patta must be deemed to have taken effect on 6th April, 1960. By the application of this fiction, the appellant must be deemed to have held also the 3.63½. acres concerned for which ryotwari patta was directed to be issued to him by the Minor Inams Tribunal on 19th February, 1973 on the notified date, namely, 2nd October, 1962. There is no escape from the conclusion that the appellants must be deemed to have held 3.63½ acres also on 2nd October, 1962 because of the statutory fiction that patta must be deemed to have taken effect on 6th April, 1980. [*Para.* 2.]

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Mohan dated 27th March, 1980 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 1092 and 1093 of 1980 presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records of the 2nd Respondent relating to the notification under section 12 of Tamil Nadu Land Reforms Act, 1961 published at pages 10 to 11 and 12, pages 10 to 12 and 13 to 15 of Supplement VI section 1 of Tamil Nadu Government Gazette dated 11th July, 1979 as confirmed by the order of the 1st respondent in Board's Ref. No. F3/RF 210/ 1979 (L. Ref.) dated 4th September, 1979 and F3/RP 211 1979 (L. Ref), dated 11th September, 1979 respectively and quash them in so far as they relate to the petitioner in each.

K. Doraiswami, for Appellant.

K Venkataswami, the Government Pleader, for Respondents.

The Order of the Court was made by

Ismail, C.J.—These are appeals against the order of Mohan, J., dated 7th March, 1980 dismissing Writ Petitions Nos. 1092 and 1093 of 1980 filed by the appellants herein. It is admitted that the facts are identical and therefore, it is enough if we refer to the facts in W P. No. 1092 of 1980. On 2nd October, 962, that is the notified date of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, the appellant had 15 standard acres. This did not include 3.63½ acres, which were pending adjudication before the Minor Inams Tribunal, inasmuch as the inam had been notified under Tamil Nadu Act XXX of 1963. On 7th July. 1971, the appellant sold away 1.93 acres and on 11th July, 1972 similarly he sold away 7.7 acres. On 19th February, 1973, the Minor Inams Tribunal directed the issue of a ryotwari patta in respect of 3.63½ acres. It was in those circumstances only a final statement was issued under section 12 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, that the appellant's holding was in excess of 15 acres, as 3.63½ acres of land, in respect of which patta was granted to the appellant by the Tribunal on 19th February, 1973 was included in the holding of the appellant. The appellant contended that no such inclusion could be made, because, patta was granted only on 19th February, 1973, was included in the holding of the appellant. The appellant contended that no such inclusion could be made, because, patta was granted only on 19th February, 1973 and consequently, the lands in respect of which patta was so granted ought not to be taken into account as part of his holding for determining his ceiling. This objection was overruled by the authorities and hence, the writ petition. The learned Judge having dismissed the writ petitions, the present writ appeals have been preferred.

2. In this context it is relevant to point out the specific provision made in sub-section (3) of section 50 of Tamil Nadu Act XXX of 1963 under which alone the patta for 3.63½ acres was granted to the appellants herein. That provision states :

> "For the purposes of the Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), any ryotwari patta granted under this Act shall be deemed to have taken effect on the 6th day of April, 1960 and for the purposes of calculating the standard acre under the Act, 'land revenue' shall, in respect of the land referred to in sub-section (1), mean the ryotwari assessment payable in pursuance of the ryotwari settlement referred to in sub-section (2)".

Thus, it is clear that section 50 (3) of Tamil Nadu Act XXX of 1963 has created an express

iction that independent of the date of the grant of ryotwari patta to a person under the provisions of that Act the patta must be deemed to have been taken effect on 6th April, 1960. By the application of this fiction, the appellants must be deemed to have held 3.63½ acres also on the notified date, namely 2nd October, 1962. If that is the legal consequence, the authorities cannot be said to have acted illegally in the case. As a matter of fact, as we pointed out already, the appellants approached the authorities and one such authority was the Commissioner, Board of Revenue. He while, referring to the above legal position, observed :

> "However, if petitioner has not had an opportunity to specify the lands to be declared as surplus, he may be given such an opportunity and his offer considered with reference to the provisions of the law."

Even though the above observation is in favour of the appellants herein, as far as the position of the law is concerned as indicated above, there is no escape from the conclusion that the appellants must be deemed to have held 3.63½ acres also on 2nd October, 1962, because of the statutory fiction that patta must be deemed to have taken effect on 6th April, 1980. Under these circumstances, these appeals fail and are dismissed. There will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ratnam, J.*

Manicka Gramani ... *Appellant**

v.

V. Venkateswara Iyer and others ... *Respondents*

(A) *Civil Procedure Code (V of 1908), Order 21, rule 89 — Scope and applicability—Payments made by judgment-debtor to decree-holder before proclamation of sale—To be deducted by judgment-debtor while making the deposit — Application seeking to set aside sale—No need to deposit poundage.*

(B) *Civil Rules of Practice, rule 203 (1)—Applicability.*

The appellant (judgment-debtor) did not plead an adjustment as such, but the appellant and the respondents 1 and 2 decree-holders were not at variance with each other with reference to payment of a sum of Rs. 6,500 by the appellant to the decree-holders. The acceptance of the payment of Rs. 6,500 made by the appellant would amount to payment received by the respondents 1 and 2 since the date of the proclamation of sale, and had to be deducted under the provisions of Order 21, rule 89, Civil Procedure Code, from and out of the amounts payable by the appellant in making the deposit in his application under that provision. Order 21, rule 89, Civil Procedure Code, does not indicate that poundage as such is contemplated as an item of deposit under its provisions. That this is so is also put beyond doubt by rule 203 (1) of the Civil Rules of Practice, which states that if the sale is set aside under Order 21, rule 89 of the Code, the Court may make an order for payment by the judgment-debtor of the poundage and other costs and interests, if any, not charged by the proclamation of sale.

*C. M. A. No. 66 of 1980. 22nd July, 1980.

A plain reading therefore of the provisions of Order 21, rule 89, along with rule 203 (1) of the Civil Rules of Practice, clearly establishes that in an application under Order 21, rule 89, seeking to set aside the sale, poundage need not be deposited. Since poundage is a charge made by the Court on the sale of the property which can be made payable by the judgment-debtor under rule 203 of the Civil Rules of Practice only after the sale is set aside, the poundage in this case need not be deposited earlier. [*Paras* 5 *and* 6.]

Cases referred to:—

Subbayya v. *Venkata Subbi Reddi*, (1935) 42 L. W. 62 : A. I. R. 1935 Mad 1050; *Vedula Lakshminarasimhacharyulu* v. *Lakshmiamma*, (1912) M. W. N. 755 ; *Ananta Lakshmi Ammal* v. *Sankaran Nair*, (1913) 24 M. L. J. 205 ; *Muthuvenkatapathy* v. *Kuppu*, (1940) 1 M. L. J 629 : I. L. R. (1940) Mad. 699 : 51 L. W. 527 : A. I. R. 1940 Mad. 427 ; *Gopal Chandra Chanda* v. *Gobardhan Chandra Chanda*, A. I. R. 1938 Cal 523 ; *Sannidhanam Lakshami Kantayya* v. *Chatam Suryanarayana*, (1963) 1 An. W. R. 73 : A. I. R. 1963 A. P. 198.

M. Sundaram, for Appellant.

T. R. Mani, *A. S. Viswanathan*, *B. Motilal Jain* and *P. Jayaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The legal representative of the deceased judgment-debtor in O. S. No. 6757 of 1973, 10th Assistant Judge, City Civil Court, Madras, is the appellant in this appeal. The property bearing door No. 205, Arcot Road, Vada Palani, Kodambakkam, Madras, belonged to the family of the appellant and respondents 1 and 2 in execution of the decree obtained by them in O. S. No. 6757 of 1975, brought the property to sale in E. P. No. 2336 of 1976 and the third respondent purchased the property in the sale held on 22nd November, 1978, for a sum of Rs. 56,250 The third respondent had also deposited, according to the appellant, 25 per cent of the sale consideration on 23rd November, 1978. The appellant further stated that out of the amount due to the decree-holder mentioned in the sale proclamation, a sum of Rs. 6,500 in instalments of Rs. 5,000 and Rs. 1,500 had been paid after the E. P. and therefore, the amount due to the decree-holder as on the date of sale was only Rs. 19,500. Claiming that he had deposited a sum of Rs. 19,500 together with a sum of Rs. 2,812 50 representing 5 per cent of the sale consideration paid by the court-auction-purchaser and a further sum of Rs. 677.50 to cover the expenses of sale, totalling in all to Rs. 23,000, the appellant filed the application under Order 21, rule 89 of the Code of Civil Procedure, to set aside the Court sale held on 22nd November, 1978 The appellant had also expressed his willingness to deposit some more amount if found due, though he had stated that he had paid into Court a sum of Rs. 23,444.

2. The decree-holders *viz.*, respondents 1 and 2 herein made an endorsement that they have no objection for the sale being set aside as the decree amount has been deposited into Court. The application was resisted only by the third respondent herein on the ground that the application had neither been filed in time nor the correct amount deposited.

3. The learned 10th Assistant Judge, City Civil Court, Madras, held that the petition under Order 21, rule 89 of the Code of Civil Procedure, having been filed by the appellant on 21st December, 1978, was well within time. However, the learned 10th Assistant Judge held that in the absence of any date or document to show that the sum of Rs.6,500 had been paid to respondents 1 and 2, this amount could not be deducted from out of the amounts to be deposited In addition, it was also held that the appellant had not paid the poundage of Rs 1,725. In this view, the Court below held that the appellant had not paid the entire amount and therefore, the sale cannot be set aside. Consequently, the petition was dismissed. It is the correctness of this order that is challenged in this appeal.

4. It is necessary at this stage to deal with an objection raised by the learned counsel

for the 3rd respondent to the effect that the petition is barred by limitation. It is not disputed that the sale of the property was held on 22nd November, 1978. The objection that is raised by the third respondent is that the petition had been filed on 6th January, 1979, and therefore, the application is barred. The other objection that is raised in this connection is that the deposit of the amount was made on 27th February, 1979, long after the filing of the application and consequently, there was no deposit within time as contemplated in an application under Order 21, rule 89, Civil Procedure Code. A perusal of the application filed by the appellant under Order 21, rule 89 shows that the petition had been signed on 21st December, 1978 and, it also bears the Court's seal for having been presented into Court on 21st December, 1978. Therefore, there is no substance in the objection of the third respondent that the petition was filed only on 6th January, 1 79, and consequently, it is barred. With reference to the objection that there was a delayed deposit of the amount into Court, it is found from the records that a sum of Rs. 23,000 had been deposited into the Reserve Bank of India on 22nd December, 1978, and that chalan had also been produced before the City Civil Court, Madras; but that the amounts so paid had been given credit to on 27th February, 197», after verifying the payment made into the Reserve Bank of India, Madras. It is, therefore, obvious that the payment had also been made within 30 days from the date of sale. Consequently, it is not open to the third respondent to raise the objection that the application and the payment were made out of time.

5. The learned counsel for the appellant contends that respondents 1 and 2 in this case accepted the payment of Rs. 6,500 made by the appellant after the proclamation of sale and consequently, it is not open to the third respondent to dispute those payments and claim that there is a short-fall in the deposit as contemplated under Order 21, rule 89, Civil Procedure Code. On the other hand, the learned counsel for the third respondent contends that inasmuch as there is no proof before the Court that the amount of Rs. 6,500 had been paid to the decree-holders/respondents 1 and 2 herein, the appellant is not entitled to deduct that amount from the deposit and therefore, the deposit is not for the full amount. It is necessary to consider therefore the question whether the payment made by the appellant to respondents 1 and 2 should be either certified or otherwise established apart from the statement of the respondents 1 and 2 that the money had been so paid in order to enable him to deduct that amount from out of the amounts to be deposited in an application under Order 21, rule 89, Civil Procedure Code. In this connection, the learned counsel for the appellant draws my attention to the decision in *Subbayya* v *Venkata Subba Reddi*[1]. In that case, the question arose whether the expression "any amount which may have been received by the decree-holder" would include anything equivalent to the amount which is due to the decree-holder by the judgment-debtor under the decree. In that case, the judgment-debtor in an application under Order 21, rule 89, Civil Procedure Code, merely deposited 5% required under clause (1) (*a*); but did not deposit the amount required under clause (1) (*b*) *viz.*, for payment to the decree-holder of the amount specified in the proclamation According to the judgment-debtor, this was so because the decree-holder had accepted a mortgage from the judgment-debtor in satisfaction of the amount due to him under the decree. On an objection raised by the auction-purchaser that it was not sufficient compliance with Order 21, rule 89, and therefore the sale ought not to be set aside, Beasley, CJ., held that the judgment-debtor had complied with the conditions laid down in Order 21, rule 89, Civil Procedure Code, and it was not necessary that the decree-holder should have received the amount under clause (1) (*b*) in cash, that it was enough if the decree holder was satisfied with regard to the whole amount due to him under the decree and that the Court was bound to set aside the sale. In doing so, Beasley, CJ, referred to *Vedula Lakshminarasimhacharyulu* v. *Lakshmiamma*[2] and

1. (1935) 42 L W 692: A. I. R. 1935 Mad. 1050.
2. (1912) M. W. N. 756.

Ananta Lakshmi Ammal v *Sankaran Nair*[1]. In the first case which arose under the provisions of the old Code of 1882, the wording of which is exactly similar to words found in Order 21, rule 89, Civil Procedure Code, it was held that an agreement with the decree-holder's widow to treat a portion of the decree debt as discharged in consideration of services rendered by the judgment-debtor to her husband is a valid discharge and actual receipt of cash is not necessary In the latter decision, the decree-holders waived a portion of the decree amount and such waiver was held to satisfy the requirements of the Rule. At page 206, the Bench observed thus :

> "The whole amount due to the decree-holder was no doubt paid in cash to the decree-holders. They waived a portion of the amount due to them and put in an application to the Court requesting that satisfaction might be entered of the whole amount due to them under the decree .... It was held by this Court in *Vedula Lakshminarasimhacharyulu* v *Lakshmiamma*[2], that the payment to the decree holder need not be in cash and that it is enough if the decree-holder is satisfied with regard to the whole of the amount due to him to justify an application under Order 21, rule 89."

In *Muthuvenkatapathy* v. *Kuppu*[3], a Full Bench of this Court had occasion to consider the scope of Order 21, rule 89, Civil Procedure Code, and the question whether payment in cash to the decree-holder alone is within the contemplation of the provisions of Order 21, rule 89, Civil Procedure Code, and the assignment of a mortgage would not amount to payment to a decree holder. In considering this question, Leach, CJ, speaking for the Full Bench stated thus :

> "Order 21, rule 89, Civil Procedure Code, permits a judgment debtor to apply to the Court to have a sale of immovable property in execution set aside provided certain conditions are fulfilled. He must deposit in Court for payment to the purchaser a sum equal to 5 per cent. of the purchase money and in addition must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale have been received by the decree-holder. Rule 92 requires these deposits to be made within 30 days from the date of sale. If the deposits are made within the required period the Court is bound to set aside the sale. Under the provisions of Article 166 Limitation Act, the application for setting aside must be filed within 30 days of the sale".

Again in considering the question whether the delivery by the judgment-debtor to the decree-holder of money's worth would not relieve him from the necessity of paying into Court the whole of the decretal amount to entitle him to an order setting aside the sale, the Full Bench referred to the decision in *Lakshinarasimhacharyulu* v. *Lakshiammal*[1], *Anantha Lakshmi Ammal* v. *Sankaran Nair*[2], and *Subbayya* v. *Venkata Subba Reddi*[3] and held that any payment or adjustment made by the judment-debtor which satisfies the decree-holder is a payment within the meaning of the rule. It is thus evident that payment to the decree-holder need not be only by cash and that it is also open to the decree-holder as pointed out by Benson and Sundaram Ayyar, JJ, to waive a portion of the amount due to him and that the waiver operated as payment under Order 21, rule 89, Civil Procedure Code. In the present case, it is not as if the appellant pleaded an adjustment as such, but the appellant and respondents 1 and 2 decree-holders are not at variance with reference to payment of Rs. 6,500 made by the appellant to the decree-holders. In view of the circumstance that respondents 1 and 2 accepted the payment of Rs. 6,500 made by the appellant, this would amount to payment received by respondents 1 and 2 since the date of the proclamation of sale which has to be

1. (1913) 24 M. L. J. 205.
2. (1912) M. W. N. 756.
3. (1940) 1 M.L.J. 629: I. L. R. (1940) Mad. 699 : 51 L. W. 5?7: A. I. R. 1940 Mad. 427.

1. (1912) M. W. N. 756.
2. (1913) 24 M. L. J. 205.
3. (1935) 42 L.W. 692 : A.I.R. 1935 Mad. 1050.

deducted under the provisions of Order 21, rule 89, Civil Procedure Code, from out of the amounts payable by the appellant while making the deposit in his application under Order 21, rule 89, Civil Procedure Code. The Court below was, therefore, in error when it held that the appellant had not deposited the sum of Rs. 6,500 along with his application to set aside the sale under Order 21, rule 89, Civil Procedure Code.

6. The next objection that is raised by the learned counsel for the appellant is that the poundage need not be deposited by the appellant who seeks to set aside the Court-auction sale by resorting to Order 21, rule 89, Civil Procedure Code. That provision as amended in Madras reads thus :

> "89 (1). Where immovable property has been sold in execution of a decree, the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court—
>
> (*a*) for payment to the purchaser, a sum equal to 5 per cent. of purchase money; and
>
> (*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for recovery of which the sale was ordered less any amount which may, since the date of the proclamation of sale, have been received by the decree-holder :
>
> Provided that where the immoveable property sold is liable to discharge a portion of the decree debt the payment under clause (*b*) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay.
>
> (2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.
>
> (3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale".

A reading of the aforesaid provision does not indicate that poundage as such is contemplated as an item of deposit under the provisions of Order 21, rule 89, Civil Procedure Code. That this is so is also put beyond doubt by rule 203 (1) of the Civil Rules of Practice which states that if the sale is set aside under Order 21, rule 89, of the Code, the Court may make an order for payment by the judgment-debtor of the poundage and other costs and interest, if any, not covered by the proclamation of sale A plain reading therefore of the provisions of Order 21, rule 89, Civil Procedure Code, along with rule 203 (1) of the Civil Rules of Practice, clearly establishes that in an application under Order 21, rule 89, Civil Procedure Code, seeking to set aside the sale, poundage need not be deposited.

7. The learned counsel for the appellant invited my attention in this connection to the decision of the Calcutta High Court reported in *Gopal Chandra Chanda* v. *Gobardhan Chandra Chanda and others*[1]. In that case, an application was filed by the judgment-debtor under Order 21, rule 89, Civil Procedure Code, depositing a sum equivalent to 5% of the purchase money and also the amounts specified in the proclamation of sale for the recovery of which the sale was ordered, but the poundage was not paid. The sale was set aside and in the appeal by the auction-purchaser, it was contended that the poundage had not been paid and therefore, the sale could not be set aside under Order 21, rule 89, Civil Procedure Code. Repelling this contention Derbyshire, CJ., observed at page 523, thus :

> "There is nothing in Order 21, rule 89 which makes it necessary for the judgment-debtor to put in the poundage fee as a condition precedent to the sale being set aside. Order 21, rule 92 provides that where an application is made to set aside a sale under Order 21, rule 89 and the deposit required by that Rule is made within 30 days from the date of sale, the Court shall make an order setting aside the sale. In my opinion, the learned Judge was right in setting aside the sale. There

1. A. I. R. 1938 Cal. 523.

is no hardship or injustice upon the auction-purchaser because Order 21, rule 89 (3) provides :

> Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

In the Civil Rules and Orders which are made by this Court for application to District Courts it is provided in Chapter X, rule 246 :

> "1. When a sale of immovable property is set aside under Order 21, rule 89 or section 174 (1), Bengal Tenancy Act, the Court, may make an order for payment by the judgment-debtor or by the person at whose instance the sale is set aside, of the poundage fee and other costs, if any, not covered by the proclamation of sale."

On this reasoning, the order setting aside the sale even though poundage had not been deposited, was upheld. In *Sannidhanam Lakshmi Kantyya* v. *Chatam Suryanarayanan and another*[1] a Division Bench of that Court held that on the language of Order 21, rule 89, Civil Procedure Code, and the relevant rules of the Civil Rules of Practice that in order to entitle the judgment-debtor to have the sale set aside under Order 21, rule 89, Civil Procedure Code, only two payments have to be made, namely : (*i*) compensation to the auction-purchaser equivalent to five per cent. of the purchase money; and (*ii*) the decretal amount as indicated in the proclamation of sale for the recovery of which the sale was ordered for being paid to the decree-holder The Court observed in this connection thus :

> "We cannot import into this provision of law the payment of poundage which should only follow the setting aside of the sale as is clear from rule 203 of the Civil Rules of Practice which postulates that the Court 'may make an order for payment by the judgment-debtor of the poundage and other costs and interest, if any, not covered by the proclamation of sale', after the sale is set aside under Order 21, rule 89, Civil Procedure Code and not before If that were the legal position, we fail to see how the failure to deposit the full poundage which here we are told comes to Rs. 32.49 nP. would result in the dismissal of the application to set aside the sale."

In view of the decisions referred to above and since poundage is a charge made by the Court in the sale of the property which can be made payable by the judgment-debtor under rule 203 of the Civil Rules of Practice only after the sale is set aside, the poundage of Rs. 1 725-need not have been deposited at all by the appellant. The conclusion of the Court below contra cannot, therefore, be sustained.

8. It is not disputed that if the sum of Rs. 6,500 is deducted as it should be and the poundage also need not be deposited, the amount actually deposited by the appellant is in excess of the amounts that should be deposited by him in his application under Order 21, rule 89, Civil Procedure Code. The appellant, therefore, is entitled to have the Court-sale held on 21st November, 1976, set aside. The order of the Court below is therefore set aside and the Civil Miscellaneous Appeal is allowed. No costs.

R S. ——— *Appeal allowed.*

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1. (1963) 1 An. W.R 73 : A.I.R 1963 A. P. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

Karnamalai Konar *alias* Karanthamalai Konar ... *Petitioner**

v.

B. Venkateswaran and another ... *Respondents.*

Civil Procedure Code (V of 1908), Order 47, rule 1 — Review — Error apparent on the face of the record not playing vital role as to result — Effect — Erroneous understanding of law not affecting decision of Court — Not a ground for review.

Held: Where an error apparent on the face of the judgment of the lower Appellate Court had not in any manner affected the conclusion which was based on other aspects and when the error apparent on the face of the order had not played any vital role as to result in an erroneous conclusion, it was of no consequence. The erroneous understanding of the law by the Court about what transpires when a notification under section 3 (*b*) of the Madras Act XXVI of 963, is issued by itself, would not result in considered decisions being set aside by a review order, even assuming that the counsel had not placed this point when the appeal was disposed of, unless, it had in any manner affected the decision. The review petition therefore was liable to be dismissed. [*paras 8. 10.*]

Cases referred to: —

Pakkri Muhammad Rowther v. *I. Swaminatha Mudaliar*, (1938) 1 M. L J. 796: 47 L.W. 474 : A. I. R. 1938 Mad. 573; *Mt. Jamna Kuer* v. *Lal Bahadur*, 1950 S C J. 117 : (1949) F. C. R. 662 : A. I. R. 1950 F.C. 131; *Natesa Naicker* v *Sambanda Chettiar*, (1941) 2 M. L. J. 350 : 54 L. W. 263 : A. I. R. 1941 Mad. 918; *Murahari Rao* v. *Balavanth Dikshit*, (1923) I L. R. 49 Mad. 955 : 45 M. L. J. 309: 18 L. W. 363 : A. I. R. 1924 Mad. 98; *Kodaikanal Motor Union (P.) Ltd. by the Managing Director* v. *Srinivasa Roadways. Madurai*, (1978) 2 M.L.J. 273 : 91 L.W. 529 : (1979) A.C.J 397 : A.I.R. 1979 Mad 14; *Benoy Krishna Rohatgi* v. *Surajbali Misra*, A. I. R. 1963 Cal. 101; *Ram Surat* v *Shitla Prasad*, A. I. R. 1978 All. 270 ; *Soosai Anthony D' Costa Nicholas* v. *Francis Roche Anthony Kumsh Roche*, (1962) 1 M. L J. 376 : I L. R. (1962) Mad. 804 : 75 L. W 244 : A. I. R. 1962 Mad. 304 ; *Bhagwati Singh* v. *Deputy Director of Consolidation*, A. I. R. 1977 All. 163 ; *Ram Murti* v. *Bank of Patiala*, A. I. R. 1951 Pepsu 54 ; *Abdul Kadir Rowther* v. *The State of Madras*, (1972) 85 L. W. 287 ; *Velayudham Pillai* v. *Sandhosa Nadar*, (1973) 86 L.W. 534; *Rajanarayana Perumal Temple, Melaiyur, Sirkali Taluk by its Executive Officer* v. *Rathinam Pillai*, (1979) 1 M L. J. 159 ; *K. Somasundaram Pillai* v. *P. Dorairaj*, (1979) 1 M. L J. 443 ; *Sushil Kumar Sen* v. *State of Bihar*, (1975) 1 S C. C. 774 : (1975) 3 S. C. R. 942 : A. I. R. 1975 S. C, 1185.

Petition under Order 47, rule 1, Civil Procedure Code, praying that in the circumstances stated therein the High Court will be pleased to review the Judgment of Mr. Justice N. S. Ramaswami, dated 8th November, 1977, and passed in S. A. No 964 of 1974 preferred to the High Court against the decree of the Court of the Addl. Subordinate Judge, Kumbakonam, in A. S. No. 86 of 1972 (O. S. No. 424 of 1970 D. M.C. Kumbakonam).

T. R. Srinivasan, for Petitioner.

V. Swaminathan, for Respondents.

The Court made the following

ORDER.—First defendant in the suit and who was the appellant in S. A. No. 964 of 1974 is the petitioner herein. First respondent herein, as plaintiff, filed a suit for declaration and possession and for past and future mesne profits in respect of the suit properties which consist of two items. First item is an extent of 7 cents of natham in R S. No. 200 of 1974 and second item is an extent of 23 cents of punja lands in R. S. No. 150/1-A1. The present dispute is confined to the first item, which was purchased by one

*Rev. C. M. P. No. 5282 of 1979 in S. A. No. 964 of 1974.

3rd January, 1980.

Subramania Sastri in a Court-auction-sale in O. S. No. 489 of 1900 as evidenced by Exhibit B-13 and thereafter his son Krishnaswami Sastri became entitled to the properties. There is no dispute regarding the identity of the suit properties. Krishnaswami Sastri had two wives and second defendant is his second wife and through his first wife he had a son by name Ramamurthi Iyer and these two persons survived as the heirs of Krishnaswami Sastri. There was a partition between Ramamurthi Iyer and the second defendant under Exhibit A-2 dated 19th January, 1963 in which item No. 1 was allotted to Ramamurthi Iyer. It is the admitted case that when Krishnaswami Sastri was alive, first defendant's brother Alagappan took the properties on lease for locating a rice mill and a lease deed was executed on 23rd January, 1949, and he was paying the annual rent of Rs 100 inclusive of the usufructs of the trees and in or about 1956 it was revised as Rs. 120 per annum. After Alagappan's death, first defendant continued to enjoy the benefits of the lease While so, on 11th May, 1969, the plaintiff purchased the property from Ramamurthi Iyer and immediately issued a notice Exhibit A-4 to the first defendant on 25th June, 1969, terminating the lease and asking for vacant possession. It is after receipt of the said notice, first defendant had purchased the property from the second defendant on 3rd July, 1969, under Exhibit B-12. Therefore, the suit was filed by plaintiff for the reliefs claimed therein.

2. First defendant claimed that he was unaware of the partition under Exhibit A-2 and that in regard to the properties after being leased to Alagappan in 1949, it is only the first defendant who has been continuously enjoying the properties as a lessee, and in respect of plantain trees and coconut trees he is the cultivating tenant and therefore he cannot be evicted. Regarding the first item, it being an inam land having been taken over under Tamil Nadu Act XXVI of 1963, a patta had been issued in favour of the second defendant under section 15 (4) of the Act and therefore plaintiff has no title to the property under Exhibit A-1, and hence the notice to quit is invalid. Second defendant claimed that she has secured patta for the suit properties and being the owner of the properties she had validly conveyed the properties under Exhibit B-12. The trial Court decreed the suit and the appeal filed by the first defendant was rejected and which was also confirmed by this Court in S. A. No. 964 of 1974

3. The present petition for review is filed on the ground that "the learned Judge erred in holding that though the partition deed does not specifically include the property in question, it must be deemed to have been included by reference to the boundaries". Mr. T. R. Srinivasan, counsel for petitioner, would further claim that there being an error on the face of the record. in that the lower Appellate Court had totally misunderstood the law in regard to the vesting of title in the State pursuant to the notification made under section 3 (*b*) of the Act XXVI of 1963 and of its failure to properly comprehend the scope of the order of the settlement officer made under Exhibit B-9 dated 8th March, 1968 and the patta No. 17 issued Exhibit, B-10, the judgment rendered by this Court on 8th November, 1977 requires to be reviewed. In support of this contention, he refers to the passage in the judgment of the lower Appellate Court to the following effect:

> "The inam lands got vested with the Government only for the limited purpose of classifying the lands as per Tharam and for converting them into ryotwari lands and for grant of patta. The possession of the properties and the legal title therein cannot be said to have got vested with the government even under section 3 (*b*) of the said Act. Therefore, it cannot be said that the legal title of the erstwhile Inamdar was completely extinguished".

Hence he contends that when this statement of law is erroneous, even though this aspect had not been dealt with in the judgment dated 8th November, 1977, it will be open to the review petitioner to claim that grounds having been taken in the second appeal, and not canvassed earlier, can now be argued by invoking Order 47, rule 1 of the Code of Civil Procedure, on the

ground that the judgment of the lower Appellate Court will form part of the records of the case, and therefore such an error found on the face of the records can be corrected even at this stage.

4. A Division Bench of this Court in *Pakkiri Muhammed Rowther* v. *I. Swaminatha Mudaliar*[1], in dealing with the scope of review under Order 47 of the Code of Civil Procedure, has laid down that there are three stages for a review application: (1) *ex parte* stage when the Court may either reject the application at once or issue a rule calling upon the other side to show cause as to why review should not be granted; (2) after hearing the respondent, it may admit or reject it; (3) if it entertains the application, in the thrid stage it will hear the matter on merits which may ultimately result in a repetition of the former decree or may be varied by it and what is decided ultimately will be a fresh decree in the matter.

5. Already notice had been issued on the basis of the points taken by Mr Srinivasan and the matter is now in the second stage. Mr. Swaminathan, counsel for respondent, contends that the onus is on the petitioner to establish any error on the face of the record which would necessitate going into the merits of the matter in great detail, and in reading the order already made if no error can be made out, merely because a particular point had not been canvassed assuming it to be so, or that the Courts below have misunderstood the law on one aspect, a Court cannot keep on re-writing its judgments. Though not the entire merits of the matter can be gone into at this stage, if the error is touched upon on the face of the record, even at this stage to a limited extent it would not be improbable to find out whether ultimately this Court would set aside the entire order or not.

6. Mr. T. R. Srinivasan in dealing with the scope of a review petition begins by referring to the decision rendered in *Mt. Jamna Kuer* v. *Lal Bahadur and others*[1] in which it was held that:

> "Where there is an error apparent on the face of the record, whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court, is not a circumstance which can affect the exercise of jurisdiction of the Court to review its decision".

In that matter there was a mistake as to the items of property on which claim had been laid and it was found that some properties had been left out and hence, it was concluded that there was an error apparent on the face of the record. By referring to the decision in *Natesa Naicker* v. *Sambanda Chettiar*[2], he pleads that if by unfortunate oversight the Judge has gone palpably wrong, by the omission of those concerned to draw his attention to an established legal position, it may constitute a proper case of an error apparent on the face of the record. To contend that the error on the face of the record would not be confined only to law but also to facts, reliance is placed on the Division Bench decision in *Murahari Rao and others* v. *Balavanth Dikshit and another*[3]. That even if the error is regarding certain figures furnished to Court relating to the amount covered by Insurance Policies, if the counsel had failed to bring the terms of the policy to the notice of the Court and thereafter after realising the slip or omission, if a review petition is filed, the Court would not hesitate to give relief has been so held in *Kodaikanal Motor Union (P) Ltd. by the Managing Director* v. *Srinivasa Roadways, Madurai and others*[4]. Thereafter he refers to the decision in *Benoy Krishna Rohatgi and others* v. *Surajbali Misra and another*[5],

1. (1938) 1 M. L. J. 796: 47 L. W. 474: A. I. R. 1938 Mad. 573.

1. 1950 S. C. J. 117: (1949) F. C. R. 662: A. I. R. 1950 F. C. 131.
2. (1941) 2 M. L. J. 390: 54 L. W. 253: A. I. R. 1941 Mad. 918.
3. (1923) I. L. R. 46 Mad. 955: 18 L. W. 363: 45 M. L. J. 309: A. I. R. 1924 Mad 98.
4. (1978) 2 M. L. J 273: (1979) A. C. J. 397: 91 L. W. 509: A. I. R. 1979 Mad. 14.
5. A. I. R 1963 Cal. 100.

raised by the learned counsel for the respondents are two-fold: (1) Under the Foreign Exchange Regulation Act, 1973, it is only the Central Government which can be taken to be aggrieved against the decision of the Foreign Exchange Regulation Appellate Board under section 54 of the Act, allowing the appeal filed by the respondents and the Director of Enforcement who passed the initial order of adjudication cannot file the appeal treating himself as an aggrieved person. (2) The Director of Enforcement being himself a quasi-judicial Tribunal passing an order of adjudication cannot be, in any event, taken to be aggrieved against the decision of the Foreign Exchange Regulation Appellate Board reversing his decision and, that, therefore, this appeal filed by the Director of Enforcement cannot, in any event, be maintained.

3. These preliminary objections have been raised even at an earlier stage when the appeal was being heard by Sathiadev, J. Taking note of these objections, the appellant, Director of Enforcement, has chosen to file C. M. P. No. 12251 of 1979 seeking an amendment of the cause title in the Memorandum of Appeal grounds by substitution of the name of the appellant, as "the Government of India", represented by the "Director of Enforcement" instead of the original appellant "Director of Enforcement." Though the said petition purports to be an innocuous one for amendment of the cause title in the memorandum of grounds, it really amounts to the substitution of a new appellant in the place of the original appellant, the Director of Enforcement whose right to file and maintain an appeal against the order of the Foreign Exchange Regulation Board has been questioned. In paragraph 12 of the affidavit in support of the said petition for amendment, it has been stated that though the appellant's name is shown as the Director of Enforcement, the appeal has, in fact, been filed on behalf of the Government of India, and, therefore, the appeal should be treated as having been filed by the Government of India. I do not see how the appeal which is purported to have been filed by the Director of Enforcement can be said to have been filed by the Government of India. Even if the Director of Enforcement has been authorised to file the appeal and the appeal has been filed at the instance of the Government of India, the cause title of the appeal memorandum should show the Government of India as the appellant. But when the memorandum of grounds of appeal shows the Director of Enforcement as the appellant it is not open either to the Director of Enforcement or to the Government of India to say that the appeal has been filed by the Government of India. Admittedly, the Director of Enforcement is an authority subordinate to the Government of India. Therefore, the Director of Enforcement cannot in any sense be equated with or treated as the Government of India. Further, it is significant to note that even the amendment petition has been filed only by the Director of Enforcement and not by the Government of India. It would have been a different matter if the Government of India has filed a petition stating that the appeal has been filed at their instructions, but it has been filed by mistake or inadvertence in the name of the Director of Enforcement and, therefore, Government of India may be allowed to be shown as the appellant. Having regard to the fact that the Government of India has not so far come into the picture, the petition for amendment filed by the original appellant, the Director of Enforcement, for a change in the name of the appellant from the Director of Enforcement into the Government of India represented by the Director of Enforcement cannot be allowed. Hence, the said petition has to be dismissed, and it is dismissed accordingly.

4. On the question as to the maintainability, of the appeal, it is seen that the *Explanation* so section 54 of the Foreign Exchange Regulation Act, 1973, treats only the Central Government as an aggrieved party for the purpose of filing an appeal to the High Court in respect of orders passed by the Foreign Exchange Regulation Appellate Board under that section. Therefore, only the Central Government can file and prosecute an appeal against the order of the Appellate Board, and not any other authority. In this case, the appeal has been filed

by the Director of Enforcement, who is the initial authority who passed the adjudication order against the respondents and whose order has been set aside by the Appellate Board on an appeal filed by them. Therefore, the Director of Enforcement cannot be said to be aggrieved by the order of the Appellate Board merely because its order of adjudication has been set aside by the Appellant Board. If that were to be possible every subordinate Tribunal can file an appeal against the order of the Appellate Tribunal reversing its decision, to a further appellate forum. The Director of Enforcement cannot be treated as an aggrieved party, for while passing the order of adjudication he has acted only as a quasi-judicial Tribunal, and such a quasi-judicial Tribunal cannot have a grievance when its order is set aside by a higher appellate forum. If he entertains a grievance when the appellate forum sets aside its order, then he should be taken to have had a bias in the dispute which has been adjudicated by him. Therefore, it will be against the principles of natural justice if we assume that the Director of Enforcement who is a quasi-judicial Tribunal adjudicating a matter between the Government and the person sought to be proceeded against for violation of the provisions of the Act, had an interest, personal or otherwise, in the matter which was the subject-matter of the dispute which he adjudicated. It would have been a different matter if the statute authorised the Director of Enforcement to file an appeal. But admittedly in this case, the Director of Enforcement has not been statutorily authorised to file an appeal against the order of the Appellate Board at the instance of the Government of India otherwise. If the quasi-judicial Tribunal is expected to question the orders of the appellate bodies, a specific power has to be given to the initial Tribunal under the relevant statute. Under sections 253 and 256 of the Income-tax Act the Income-tax Officer who passes the original order of assessment in his capacity as quasi-judicial Tribunal, is enabled to file an appeal against the order of the Appellate Assistant Commissioner setting aside his orders, on the directions or at the instance of the Commissioner of Income-tax. Under section 57 of the Tamil Nadu General Sales Tax Act, power is given to the Deputy Commissioner of the Commercial Taxes to file a revision to the High Court against the order of the Sales Tax Appellate Tribunal. We can cite many such instances where the statute specifically enables the initial quasi judicial authority to file an appeal against the reversal of its judgment by the appellate authority to a further appellate or revisional forum. Such a statutory provision is necessary for the reasons aforestated, as otherwise, it will lead to the inevitable conclusion that the initial authority had an interest in the dispute before it, and, therefore, it considers itself aggrieved when its judgment was reversed by an appellate forum. In this view of the matter, the Director of Enforcement, who is the appellant in this case, cannot be said to be an aggrieved person.

5. A faint argument was advanced on the side of the appellant that the original order of adjudication was passed by the Deputy Director of Enforcement, and not by the Director of Enforcement, who is the appellant herein. Even so, the Deputy Director of Enforcement should be taken to have acted by virtue of the powers delegated to him by the Director of Enforcement, and, therefore, the order of adjudication should be taken to have been passed only by the Director of Enforcement. In this case, apart from the fact that the cause title in the memorandum of grounds of appeal shows only the Director of Enforcement as the appellant, no material has been placed before the Court, even after the question of maintainability has been raised, to convince the Court that the Central Government actually decided to appeal against the order of the Appellate Board and instructed the Director of Enforcement to file the appeal on their behalf. In those circumstances, I am inclined to hold that the appeal filed by the Director of Enforcement against the order of the Appellate Board cannot be maintained.

6. The appeal is, therefore, dismissed as not maintainable. There will be no order as to costs. The dismissal of this appeal is, however, without prejudice to the right of the Government of India to file an appeal against the order of the Appellate Board, if they are so advised with a petition to excuse the delay if it is possible.

S. J. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*G. Ramanujam and S. Swamikkannu, JJ.*

M. O. H. Aslum and another ... *Appellants**

v.

M. O. H. Uduman and two others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 40, rule 1 —Appointment of Receiver by Court—Factors to be taken into consideration—Plaintiff to make out prima faice *case as regards title to the property.*

There cannot be any dispute that the Court can appoint a Receiver in an interlocutory application to protect properties which are the subject-matter of the suit if there is any apprehension that the properties will be damaged, wasted or misappropriated. But a Receiver can be appointed only in a case where the plaintiffs make out a *prima facie* case as regards title to the property. [*Para.* 8.]

It is well-established that in a case where the plaintiff's title to an asset is disputed a Receiver cannot be appointed in relation to that asset pending the suit in which the title to that asset has to be established. [*Para.* 11.]

It is true that the Court has got absolute discretion in the matter of appointment of Receiver. But the discretion cannot be exercised in an arbitrary and in an unreasonable manner. It has to be exercised cautiously, judiciously and according to well established legal principles. [*Para.* 14.]

Held, that in the instant case the plaintiffs had not made out a *prima facie* case for exercising the discretion in their favour. In that view the Civil Miscellaneous Appeal was allowed [*Para.* 14.]

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*A. A. O. No. 291 of 1980. *9th July,* 1980.

Case referred to:—

Greville v. *Fleming,* (1845) 2 J. and L. 335.

Appeal against the Order of the Court of the I Addl. Subordinate Judge, Pondicherry dated 30th April, 1980 and made in I. A. No. 1554 of 1979 in O. S. No. 287 of 1978.

J. Stanislas, for Appellants.

P. Jayaraman, for 1st Respondent.

N. Ganapathy, for 2nd Respondent.

T. Raghavan, for 3rd Respondent.

The Judgment of the Court was delivered by

Ramanujam, J. — The civil miscellaneous appeal is directed against the order of the First Additional Subordinate Judge, Pondicherry in I. A. No. 1554 of 1979 in O. S. No. 287 of 1978 appointing an Advocate-Receiver to take charge of a business carried on in the name and style of S. S. Agencies, pending the suit O. S. No. 287 of 1978 on his file.

2. The circumstances under which the impugned order had been passed may be briefly stated. The respondents herein filed the said suit O. S. No. 287 of 1978 on the file of the Sub-Court, Pondicherry, for a declaration that the business which is carried on by defendants 1 and 2 in the name of S. S. Agencies belongs to the partnership of M/s. Hassan Kuthus Maricar consisting of the plaintiffs and the first defendant and for other reliefs which included the relief of "committing the business of S. S. Agencies to the custody of an Advocate-Receiver". The plaintiffs and the 1st defendant in the suit are admittedly brothers and they are said to have carried on a prosperous family partnership business under the name and style of M/s. Hassan Kuthus Maricar. In or about 1977, the said family partnership is stated to have been converted into a private limited by name M/s. Hassan Khuthus Maricar Private Limited which fact is however disputed by the defendants. The Plaintiffs' case, as set out in their plaint is as follows:

3. By mutual agreement between the partners of the family partnership an agency was taken from Spencer and Company for

selling Spencer's soft drinks in the territory of Pondicherry and the said agency business was started in the name and style of S. S. Agencies with the funds of the said family partnership. The said business was entrusted in the hands of the first defendant and the agency was taken in the name of the 2nd defendant who is none else than the first defendant's wife. The agency business in the name and style of S. S. Agencies is being carried on in premises No. 2, Labourdenais Street, Pondicherry which has been taken on lease by the family partnership of M/s. Hassan Khuthus Maricar and all the establishement expenses of the said business are being met by the said firm. Thus, the plaint proceeds on the basis that though S. S. Agencies business stands and is being run in the name of the second defendant, the said business is actually one of the businesses of the familly partnership and, therefore, the said business should be declared to be the business of the family partnership. The plaintiffs have also alleged in the plaint that taking advantage of the fact that the Agency stands in the name of the 2nd defendant both the 1st and 2nd defendants are misappropriating the income from the business without bringing it to the account of the family partnership and it is on the basis of the said allegation the plaintiffs have prayed for the appointment of a Receiver for the said business.

4. The first defendant who is stated to be the power-agent of his wife, the 2nd defendant has filed a written statement wherein the business of S. S. Agencies has been claimed to be the exclusive business of the second defendant. It is averred therein that the business of S. S. Agencies has been started with the exclusive funds of the 2nd defendant, that the business is carried on in the residence of the 1st and 2nd defendant at No. 2 Labourdenais Street, Pondicherry that the said premises was taken on lease originally in 1975 by the 1st defendant for residence though at a certain point of time the partnership of M/s. Hassan Khuthus Maricar had undertaken to pay the rents for the said premises on behalf of the first defendant who is a partner of that firm. The payment of rent and the telephone charges for the telephone installed in the said premises cannot at all be connected with the business of S. S. Agencies. S. S. Agencies was always the separate exclusive business of the second defendant and neither the plaintiffs nor the firm of M/s. Hassan Khuthus Maricar had any interest therein. Thus the defendants specifically denied the claim put forward by the plaintiffs as to the ownership of the business S. S. Agencies, but put forward their claim of an exclusive title to the said business.

5. It is not disputed either in the plaint or before us that the business S. S. Agencies is being carried on as at present by defendants 1 and 2 As a matter of fact it is only on that basis the plaintiffs have prayed in the plaint for the appointment of an Advocate-Receiver to take charge of the business of S. S. Agencies from defendants 1 and 2. Along with the plaint, an application was filed on 24th October, 1978 in I. A. No. 2383 of 1978 by the plaintiffs for the appointment of a Receiver pending suit. Somehow, no orders seem to have been passed in the said application. However, another application in I. A. No. 1554 of 1979 was filed by them for the appointment of a Receiver. The Court below has appointed an Advocate-Receiver for the business of S. S. Agencies which was being carried on admittedly by defendants 1 and 2 on the date of filing the suit mainly on the ground that certain conditions imposed by the Court in some interlocutory orders had not been strictly complied with by the defendants, that the allegation made by the plaintiffs that a scrutiny of the accounts produced reveals malversation of funds appears to be justified and that, therefore, an order appointing a Rrceiver is called for.

6. In this appeal before us, the learned counsel for the appellants (defendants) contends that the plaintiffs have not made out any *prima facie* case for the appointment of a Receiver, and that as the plaintiffs' claim of ownership of the business has been stoutly denied by the defendants the plaintiffs have to establish their claim of

title before they seek the appointment of a Receiver. According to him, there is no justification for the Court below to invoke the powers under Order 40, rule 1 of the Code of Civil Procedure, on the facts of this case. Learned counsel submitted that even if it is taken that a *prima facie* title to the suit business had been made out by the plaintiffs, the Court has no jurisdiction or justification for dispossessing the defendants who are actually carrying on the business and putting that business into the hands of a third party Receiver unless a strong case is made out.

7. As against these submissions of the learned counsel for the appellants, the learned counsel for the respondents would contend that once a suit has been filed claiming title to the business it is in the interest of all the parties to appoint a third party Receiver to look after the business especially when the plaintiffs apprehend that much damage may be caused to the business and the funds of the business may be secreted by the defendants.

8. There cannot be any dispute that the Court can appoint a Receiver in an interlocutory application to protect the properties which are the subject-matter of the suit if there is any apprehension that the properties will be damaged, wasted or misappropriated. But a Receiver can be appointed only in case where the plaintiffs make out a *prima facie* case as regards title to the property. In a case where the plaintiff's title to the property is in dispute, there cannot be any appointment of a Receiver in respect of that property the title to which the plaintiff has to establish at the trial. In this case, as already stated, though the plaintiffs claimed title to the business of S S. Agencies, the defendants have categorically disputed that title and claimed exclusive title in the 2nd defendant. That the business S. S. Agencies stands in the name of the 2nd defendant has been admitted even by the plaintiffs. As a matter of fact, the plaint proceeds on the basis that the business S. S. Agencies stands in the name of the 2nd defendant and it is only on that basis they have asked for a declaration that the business which stands in the name of the 2nd defendant should be declared to be the business of the firm M/s. Hassan Khuthus Maricar. Thus *prima facie* the title to the business as on this date vests with the 2nd defendant. Till that title is displaced and the plaintiffs are declared to be the owners of the business, the Court will not be justified in appointing a Receiver for the business which is being carried on by the 2nd defendant admittedly in her own name.

9. Admittedly, a sum of Rs. 20,000 which has been initially advanced for the agency business has proceeded from the 2nd defendant. The plaintiffs however, would say that the 2nd defendant was due to the firm in a sum of Rs. 20,000 and that the said sum was utilised by the 2nd defendant for the purpose of S. S. Agencies at their instance. But no documentary evidence had been adduced with regard to the assertion that the 2nd defendant utilised the sum of Rs. 20,000 for the S. S. Agencies at the request of the firm M/s. Hassan Khuthus Maricar. This fact is denied by the 1st defendant as power-agent of the 2nd defendant and his case is that the sum of Rs. 20,000 was paid by the 2nd defendant for her own benefit in connection with the starting of the S. S. Agencies. In the light of this denial by the 2nd defendant as to the utilisation of the sum of Rs. 20,000, for the benefit of the firm, some *prima facie* material should have been placed before the Court by the plaintiffs to indicate that the 2nd defendant who is stated to be a debtor to the firm M/s. Hassan Khuthus Maricar repaid that sum by utilising the amount of Rs. 20,000 for the S. S. Agencies for the benefit of the firm. If that was a fact then the partnership accounts would clearly show the receipt of Rs. 20,000 from the 2nd defendant and the utilisation of the same for the purpose of S. S Agencies business by the firm. The plaint which sets out elaborate details as to the starting of S. S. Agencies does not indicate the motive as to why the franchise for S. S. Agencies business was taken in the name of the second defendant. Wherever a party puts forward a case of benami, it is for that party to show as to what is the motive for entering into a benami transaction. In this case, admittedly the partnership is being carried on by all the brothers and that partnership is carrying on

various lucrative businesses. There is no reason pointed out as to why this firm should carry on the suit business alone in the name of a third party, the second defendant. The materials which have been placed before the Court by the plaintiffs as showing the firm's *prima facic* title to the S. S. Agencies are *(i)* the payment of rent for premises No. 2, Labourdenais Street, Pondicherry; and *(ii)* the payment of telephone charges for the telephone installed in that premises. The defendants have given sufficient explanation as to why for some period the firm has paid the rent for the premises and also the telephone charges. It is their case that the 1st defendant is a partner of the firm M/s. Hassan Khuthus Maricar and that in pursuance of an agreement between the partners to pay the rent for the premises occupied by the first defendant a partner, the rents have been paid by the firm for the said premises, and that by the mere payment of rent for the premises, no connection can be established between the firm and the business. Having regard to the fact that the premises was taken on lease originally by the 1st defendant for his residence and the firm has paid the rents for the said premises even before the business of S. S. Agencies was started, it is not possible to connect the payment of rent with the business at all. Bven if the business of S. S. Agencies had not been started rents would have been paid for the premises used as a residence for one of the partners. Admittedly the second defendant is residing with her husbaud, the 1st defendant. Therefore, the residence of the first defendant might have been used for carrying on the business of S. S Agencies. From that circumstance alone, it is not possible to assume that S. S. Agencies belonged to the firm which paid the rent for the premises. The firm might have paid the rent for the premises on behalf of the partner. Merely by the production of the rent receipts as also the receipts for payment of telephone charges the plaintiffs cannot be taken to have established a *prima facie* case of ownership of the business S S. Agencies.

10. The learned counsel for the appellants-plaintiffs has referred to certain conduct of defendnts 1 and 2 when the matter was pending before the Court below in not strictly complying with certain conditions imposed by the lower Court. He has also referred to certain correspondence that passed between the Receiver appointed in the case and the defendants as also the bank authorities, with reference to shortage in the stocks. Once we find that there is no *prima facie* case for the plaintiffs as regards ownership of the business for which they seek for the appointment of a Receiver, the above factors by themselves will not enable the plaintiffs to get an order of appointment of a Receiver for the business. If really the defendants have not carried out certain directions issued by the Court in proceedings for the issue of injunction *etc.*, it is for the Court to take other suitable proceedings. Merely on the ground that there is no proper compliance with the order of Court, the Court cannot appoint a Receiver for an asset, the title to which the plaintiffs have to establish at the trial and especially when the plaintiffs' claim of title is disputed, and exclusive title is claimed by the defendants. The correspondence between the Receiver and the defendants on the one hand and the Receiver and the bank authorities on the other cannot be taken advantage of by the plaintiffs as they are all events subsequent to the appointment of a Receiver. To find out the correctness or otherwise of the order of the lower Court appointing a Receiver, subsequent events cannot be taken note of. We cannot, therefore attach any credence either to the alleged conduct of the defendants in the course of the interlocutory proceedings for the issue of an injunction or subsequent to the order appointing a Receiver.

11. It is well-established that in a case where the plaintiff's title to an asset is disputed. there cannot be an appointment of a Receiver in relation to that asset pending the suit in which the title to that asset has to be established. Kerr on Receivers (Fifteenth Edition) at page 79 observes :

> "As a general rule, where one person was in possession of rents and profits of an estate claiming to be the holder by a legal title, and another person also claimed to hold by a legal title, the former could not be ousted in the Court of Chancery until the true ownership of the

legal title had been finally determined at law".

It has also been pointed out by the same author that the Court would not as a rule appoint a Receiver at the instance of a person alleging a mere legal title against any party who is in actual possession of the real estate and disturb his possession. Even if the plaintiffs had established a *prima facie* title to the business still the plaintiff must allege and establish to the satisfaction of the Court that but for the appointment of a Receiver the business which is the subject-matter of the dispute will be either wasted, damaged or ruined or the funds of the business will be misappropriated. In this case except saying there is likelihood of the defendants acting adverse to the plaintiffs' interest no possible destrictive waste had been established.

12. One other matter is of considerable significance in this case. Even according to the plaintiffs, the business was started in December, 1977 and the business has been allowed to be carried on by the first defendant. In such circumstances, Courts have held that parties who have acquiesced in the property being enjoyed by others against their own alleged right cannot except in special circumstances come to Court for the appointment of a Receiver.

13. In *Greville* v. *Fleming*[1] the Court held that it is not open to the Court normally to appoint a Receiver at the instance of the person whose right is disputed, where the effect of the order would be to establish the right, even if the Court is satisfied that the person against whom the demand is made is fencing off the claim.

14. It is true that the Court has got absolute discretion in the matter of appointment of receiver. But the discretion cannot be exercised in an arbitrary and in an unreasonable manner. It has to be exercised cautiously-judiciously and according to well, established legal principles. Applying the well-established legal principles, the plaintiffs herein who seek to displace a title to the business vested in another person, cannot get an order appointing a Receiver for that business especially when their claim of title is hotly contested by the defendants who put forward an exclusive title to the business in themselves. In this case we are of the view that the plaintiffs have not made out a *prima facie* case for exercising the discretion in their favour. In this view, we allow the civil miscellaneous appeal and set aside the order of the lower Court appointing a Receiver. There will be no order as to costs.

1. (1845) 2 J. &. L. 335.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: — *M.M. Ismail, CJ. and V. Ratnam, J.*

K. Appa Rao .... *Petitioner**

v.

Maragathammal and others ... *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (i) second proviso — Tenant denying title of landlord —Whether should set up title in himself — Scope and applicability of second proviso — Applicability of principle of estoppel in section 116, Transfer of Property Act.*

(B) *Transfer of Property Act (IV of 1882).*

These petitions had been filed to revise the order of the Appellate Authority functioning under the Tamil Nadu Act XVIII of 1960, dated 12th March, 1979 allowing the appeals filed before him by the respondents herein, and dismissing the petitions for eviction by the petitioner herein. In this case, the landlord filed a petition for eviction on the ground that the tenant wilfully denied the title of the landlord. The Rent Controller dismissed the petition holding that the denial of title of the petitioner by the tenants was *bona fide* and the same was confirmed by the Appellate Authority. On revision,

Held: The definition of 'landlord' is an inclusive one and does not actually define

*C. R. P. Nos. 2504 to 2507 of 1979. 30*th April*, 1980.

the term 'landlord'. Therefore the inclusive definition adds to the normal concept of landlord, certain other categories of persons also. [*Para.* 4.]

The expression, 'denial of title of landlord' is not peculiar to the Tamil Nadu Act XVIII of 1960. It is always known to the law of landlord and tenant and incorporated in the Transfer of Property Act which provides for forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. [*Para.* 5.]

Consequently, when the proviso refers to the denial of title of the landlord by the tenant, it means that the tenant denies that the landlord has no title or right or ownership or interest in the property. As a matter of fact, for the purpose of the present case, it is not even necessary to go that extent.

In the present case, there is no controversy that the tenants denied the title of the petitioner only by putting forward the contention that somebody else had become the owner of the property, and to such a situation admittedly the principle of estoppel contemplated by section 116 of the Transfer of Property Act will not apply. [*Paras.* 8 *and* 9.]

Case referred to:

V. Vatsala v. *Official Assignee*, (1979) 1 M. L. J. 210: 92 L. W. 126.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 to revise the order of the Small Cause Court (Appellate Authority) dated 12th March, 1979 in H. R. A. No 647 of 1978 etc. H. R. C. No. 1549 of 1975 etc.

N. Shamdoss, for Petitioner.

A. Subramania Iyer, for Respondents.

Order of reference :

1. A question regarding the scope of the second proviso to section 10 (1) of the Tamil Nadu Act XVIII of 1960 has been raised in these civil revision petitions. The said second proviso reads as follows:

"Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he regards a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

All that the proviso contemplates is that a tenant should deny the title of the landlord and the Rent Controller should find out whether that denial is *bona fide* or not. The language of the proviso does not say that the proviso will be attracted only when the tenant, while denying the title of the landlord, sets up title in himself or herself. However, Mr. Shamdas, learned counsel for the petitioner, in these civil revision petitions, brings to my notice a decision of Ramaprasada Rao, CJ. in *Vatsala* v. *Official Assignee, Madras represented by the Estate of S. V. Namasivayam*[1] holding that the open language of the second proviso should be construed as contemplating the setting up of title by the tenant in himself or herself, while denying the title of the landlord and that it has no application where the tenant sets up title in a third party. Having regard to the express language of the second proviso, I am unable to accept the abovesaid interpretation as correct. Hence the matter will be posted before a Bench for disposal.

The Judgment of the Court was delivered by

Ismail, C J.— These petitions have been filed to revise the order of the Appellate Authority functioning under Tamil Nadu Act XVIII of 1960 dated 12th March, 1979, allowing the appeals filed before him by the respondents herein and dismissing the rent control petitions filed by the petitioner herein. The rent control petitions were dismissed on the ground that the denial of title of the petitioner by the tenant was *bona fide*. The result of that will be

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1. (1979) 1 M. L. J. 210: 92 L. W. 126.

that the petitioner will have to file a suit for the purpose of getting the necessary relief.

2. As far as the finding that the denial of title was *bona fide* is concerned we are of the opinion that there was abundant, material before the Appellate Authority on the basis of which it could come to the conclusion that the denial of title was *bona fide*.

3. However, what Mr. Shamdoss, the learned counsel for the petitioner, contends is that the present is not a case to which the second proviso to section 10 (1) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 will apply. Section 10 (1) of the Tamil Nadu Act XVIII of 1960, along with ts two provisos, reads as follows:

> "10 (1). A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16. Provided that nothing contained in the said sections shall apply to a tenant whose landlord is the Government:
>
> Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and, if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil court and the court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded".

According to the learned counsel for the petitioner, the second proviso has to be read along with the definition of the term 'landlord' occurring in section 2 (6) of the Act, as well as the provision for filing a suit contemplated by the proviso itself. Section 2 (6) of the Act defines the expression 'landlord' as follows: –

> "'landlord' includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, his trustee, executor, administrator, receiver, or guardian, or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant".

4. Thus, it will be seen that the definition is an inclusive one and does not actually define the term 'landlord'. Therefore, the inclusive definition adds to the normal concept of landlord certain other categories of persons also. The learned counsel for the petitioner contends that the denial of title of the landlord contemplated by the second proviso to section 10 (1) will have to be read in the context of the definition of the term 'landlord' occurring in section 2 (6) and that, if so read, it will merely mean denial of the right of the person to file an eviction petition; in other words, to question the maintainability of the petition itself.

5. If it is so understood, the maintainability of the petition can be challenged on several grounds, namely, that the person concerned is not entitled to receive the rent, that the person concerned is not an agent, trustee, executor, administrator, receiver or guardian, and that similar questions might possibly arise in such a context. However, the expression 'denial of title of the landlord, is not peculiar to Tamil Nadu Act XVIII of 1960. It is always known to the law of landlord and tenant and incorporated in the Transfer of Property Act. In fact, section 111 (*g*) of the Transfer of Property Act provides for forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. Consequently, when the proviso refers to the denial of title of the landlord by the tenant, it means that the tenant, denies that the landlord had any (*sic*) title or right or ownership or interest in the property. As a matter of fact, even for the purpose of the present case, it is not even necessary to go to that extent, having regard to the very narrow argument addressed before us.

6. The contention of Mr. Shamdoss is that in this particular case the tenants

sespondents had set up title, not in themrelves, but in a third party and that the second proviso to section 10 (1) will not cover such a situation. According to the learned counsel, the second proviso to section 10 (1) will cover only a case where, while denying the title of the landlord, the tenant sets up title in himself or herself. In support of his contention learned counsel relied on a judgment of Ramaprasada Rao, CJ. in *Vatsala* v. *Official Assignee, rep. the estate of S. V. Namasivayam*[1]. A perusal of that judgment shows that it supports this contention of the learned counsel. When the matter came up before one of us, it was felt that the view of the learned Chief Justice on the scope of the second proviso to section 10 (1) was not correct, the matter was directed to be posted before a Bench and that is how the matter has come before us now.

7. In the said judgment, with regard to the scope of the second proviso to section 10 (1), the learned Chief Justice has stated as ollows:

> "It, therefore, it follows that, if the finding of the Rent Controller is that the denial is not *bona fide*, then the Controller would be entitled to pass an order for eviction. The question that arises in the instant case is whether such a denial as contemplated under the second proviso to section 10 (1) has arisen. The proviso is very clear when it says that the tenant should deny the title of the landlord. It does not say that the tenant can vest the the title to the property in his occupation in third parties. This is the concept which is inhered in the principle of *jus tertii*. It is only in cases where the tenant, while opposing an application for eviction under the provisions of Act XVIII of 1960, sets up title in himself, or herself, the second proviso would come into operation and it is in that context alone the Rent Controller would have jurisdiction to find out whether the denial of title of the landlord and the setting up of such title in himself or herself by the tenant is *bona fide* or not. I am of the view that it is not open to the tenant to plead taking advantage of the open language of the second proviso to section 10 (1), that the denial as regards the title of the landlord might even mean and include the vesting of the title to the property in a third party. On the other hand, I am of the view that such denial of the title of the landlord would be the resultant of a claiming of title in the property by the tenant herself or himself and not by setting up title in a third party."

8. With great respect, to the learned Chief Justice, we are not able to agree with this interpretation of the scope of the second proviso to section 10 (1). Admittedly that proviso does not expressly mention a tenant setting up title in himself or herself or in a third party. That proviso merely uses the expression 'where the tenant denies the title of the landlord'. This is a negative concept But, positively, while denying the title of the landlord, the tenant may set up title in himself or herself or in a third party. That is not referred to and that is not even necessary for the purpose of the application of the second proviso to section 10 (1). So long as the tenant denies the title of the landlord, it is totally irrelevant for the purpose of the applicability of the second proviso to section 10 (1), whether he sets up title in himself or in a third party, because admittedly the language of the second proviso does not impose any restriction that it will apply only to a case where the tenant while denying the title of the landlord sets up title in himself or herself. As a matter of fact, even the learned Chief Justice was aware of this situation, when he used the expression 'the open language of the second proviso to section 10 (1). It is significant in this context to note that section 111 (*g*) of the Transfer of Property Act, already referred to uses the expression "by setting up a title in a third person or by claiming title in himself". Therefore in our view, the interpretation placed by the learned Chief Justice on the second proviso to section 10 (1) cannot be said to be correct, and, consequently, we are of the view that, so long as the tenant has denied the title of the landlord, for the applicability of the second proviso to section 10 (1), it is irrelevant and immaterial whether, in addition to denying the title of the landlord' the tenant claims title in himself or herself sets up title in a third party.

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1. (1979) 1 M. L. J. 210: 92 L. W. 126.

9. In the present case, there is no controversy that the tenants denied the title of the petitioner only by putting forward the contention that somebody else had become the owner of the property and to such a situation admittedly the principle of estoppel contemplated by section 116 of the Transfer of Property Act will not apply.

10. Under these circumstances, we are of the opinion that the conclusion of the learned Appellate Authority holding that the second proviso to section 10(1) applies to the present case, and that the denial of the title of the petitioner by the respondents is *bona fide* does not call for any interference. Consequently, the Civil Revision Petitions are dismissed. There will be no order as to costs.

R. S. —— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: — *S. Swamikannu, J.*

Aravind Laboratories .... *Appellant**

v.

V. Annamalai Chettiar ... *Respondent.*

Trade and Merchandise Marks Act (XLIII of 1958), sections 2 (1) (f), 10 (2) and 12—Registered trade mark—Infringement of—Phonetic similarity — Visual resemblance — How far relevant — Duty of Court deciding the mattter — Registered trade mark "EYETEX" —Whether infringed by trade mark "EYESOL".

For deciding a dispute regarding infringement of a trade mark the following propositions law are relevant:

1. In deciding whether the alleged infringing trade mark is likely to cause confusion in the trade or not, it is the totality of the trade mark which has to be kept in view.

2. Initial burden of showing that the defendant's mark is likely to deceive or cause confusion lies upon the plaintiffs who want to restrain the user of the alleged infringing mark. If any resemblance is found to exist between the two marks, it is then for the defendant to show that the two marks are so dis-similar that there is no reasonable probability of any considerable section of the public being deceived.

3. For deciding a dispute about the infringement of a trade mark, the Court is to have regard to the way in which the infringing trade mark will appear when it is placed on the goods of the owner of the registered trade mark. If the Courts come to the conclusion that an ordinary purchaser of the goods in question will not be able to distinguish between the offending mark and the registered mark, the Court will be justified to come to a conclusion in favour of the registered owner of the trade mark.

4. The question of possibility of confusion is not to be decided on the basis of a person looking at the two trade-marks side by side, but on the basis that normally a customer will see one trade-mark before him, being one he is looking for not in the light only of his general recollection of what the nature of trade mark sought for by him was. In deciding the question of similarity between the marks, the Court has to approach the subject from the point of view of a man of average intelligence and of imperfect recollection. The trade mark is the whole thing, that is, the total thing registered, and it is the whole thing or whole word which has to be considered.

5. The resemblance between the two marks may be phonetic, may be visual, may be arbitrary or may lie in the meaning of the word or mark.

Held, that the registered trade mark of the plaintiff "EYETEX" has been infringed by the trade mark of the defendant "EYESOL" and the defendant cannot be allowed to use

*A.S. No. 786 of 1976. *9th April, 1980*

the name "EYESOL" for the products manufactured by him. By using the name "EYESOL" the defendant has infringed the trade mark of the plaintiff and therefore the defendant is not entitled to use the name "EYESOL"

Cases referred to :—

Durga Dutt Sharma v. *N. P. Laboratories*, (1966) 1 S. C. J. 734 : (1965) 1 S. C R. 737 : A. I. R. 1965 S. C. 980; *Ruston and Hornby Ltd.* v. *Zamindara Engineering Co.*, (1971) 1 S. C. J. 34: (1970) 2 S C. R. 222 : A. I. R. 1970 S. C. 1649; *Rochel Co.* v. *G. Manners & Co.*, (1970) 2 S. C. J 621 : (1970) 2 S C R. 213 : A. I. R 1970 S. C. 2062; *Parket Knoll Ltd.* v *Knoll International Ltd.*, (1962) R.P.C. 26 ; *Pianotist Co. Ltd.'s Application*, (1906) 23 R. P. C. 774; *Aristoc Ltd.* v. *Rusta Ltd.*, (1945) R P. C. 65; *Tokalon Ltd.* v. *Davidson and Co.*, 32 R. P. C. 133; *K. Krishna Chettiar* v. *Ambal & Co.*, (1970) 1 S. C. J. 203 : (1970) 1 An. W. R. (S. C.) 21 : (1970) 1 M. L. J. (S. C.) 21 : (1970) 1 S. C. R. 290 : A. I. R. 1 70 S. C. 146; *Decordova* v *Vick Chemical Co.*, (1951) 68 R. P. C. 103 ; *Amritdhara Pharmacy* v. *Satya Deo Gupta*, (1963) 2 S. C. R. 484 : A. I. R. 1963 S. C. 449; *Corn Products Refining Co.* v. *Shangrila Food Products Ltd.*, 1960 S. C. J. 509 : (1960) M. L. J. (Crl.) 418 : 1960 1 S. C. R. 958 : A. I. R 1960 S. C. 142 ; *William Bailey (Birmingham) Ltd.'s Application*, (1935) 52 R. P. C. 136 ; *Juggi Lal* v. *Swadeshi Mills Co.*, 56 M. L. J. 282 : 56 I. A. 1 : 29 L. W. 243 : A. I R. 1929 P. C. 11 ; *K. R Chinna Krishna Chetty* v. *K. Venkatesa Mudaliar*, (1973) 2 M. L. J. 98 : A. I.R. 1974 Madras 7; *V. R Subramaniyam* v. *Balasubramaniam*, (1966) 2 M. L. J. 570 : I. L. R. (1966) 2 Mad. 288 : 79 L. W. 525 : A. I. R. 1967 Mad 186; *Mount Mettur Pharmaceutical Ltd.* v. *Ortho Pharmaceuticals Corporation*, (1975) 1 M L.J. 103 ; 87 L. W. 97 (S. N.) : A. I. R. 1975 Mad. 74; *Mount Mettur Pharmaceuticals (P.) Ltd.* v. *Dr. A. Wander*, (1977) 1 M. L. J. 21 : 90 L. W. 386 : A. I. R. 1977 Mad 105; *Parle Products (P) Ltd.* v. *J. P. & Co.*, (1973) 3 S. C. C. 432 : A. I. R. 1972 S. C. 1369.

Appeal and Memorandum of Cross objections against the decree of the District Court, Chingleput in Original Suit No. 36 of 1975, dated 17th November, 1976.

R. Kesava Ayyangar for *V. C. Sri Kumar* and *B T. Seshadri*, for Appellant.

R. Sundararajan, for Respondent.

The Court delivered the following

JUDGMENT : This appeal s by the plaintiffs against the Judgment and decree, dated 17th day of November, 1976 in O. S. No. 36 of 1975 on the file of the Court of the learned District Judge, Chengalpattu, decreeing the suit in favour of the plaintiffs restraining the defendant or his agents by a permanent injunction from using the Trade Mark similar to the Trade Mark used by him as shown in Exhibit A-5 so as to be deceptively similar with the carton of the plaintiffs, as affixed in the plaint. The carton of the plaintiffs and Exhibit A-5 were directed to be annexed to the decree. The trial Court also observed that inasmuch as the plaintiffs themselves had not raised any objection for the use of the name "Eyesol" by the defendant (Exhibit A-10) the defendant will be free to use the same name by printing the same in a different manner from that of the plaintiffs. In the circumstances, the parties were directed to bear their own eosts by the trial Court.

2. The suit was for declaration of the exclusive right of the plaintiffs to the Trade Mark and for permanent injunction to restrain the defendant from passing off his goods and also for recovery of Rs. 10,000/- as damages.

3. The memorandum of cross-objections is by the defendant, M/s. Eyesol Laboratories, represented by its proprietor, Annamalai Chettiar against the said decree and judgment passed by the learned District Judge, Chengalpattu in the abovesaid suit, O. S. No. 36 of 1975.

4. The case of the plaintiffs, M/s. Aravind Laboratories before the trial Court is that they are the manufacturers of Collyrium and other toilet preparations under the registered Trade Mark "Eyetex". Their firm, which is a registered one is engaged in the manufacture of Collyrium under the registered Trade Mark under special design, get up, and distinctive attractive marks. They are

successors in trade from one, P. K. Vasudevan, who used the same name and Trade Mark "Eyetex" for the products manufactured and distributed by M/s. Aravind Laboratories carrying on business at Valasaravakkam, Arcot Road, Madras. The predecessors in trade had registered the mark "Eyetex" under Trade Mark No. 124824, dated 11th September, 1946. It is also the case of the plaintiffs, that the plaintiff's carton on the front face shows the eyebrow, eyelashes and side hair of the head with small eyeshaped design in front of the eyeball, that even then, the defendant had made a false claim that his carton was registered under the Trade and Merchandise Marks Act, 1958, and the same is a deliberate falsehood. The plaintiffs after the purchase, registered the design on the front face of the carton and also the entire format of the carton under Trade Mark No. 271584, and it is dated, 24th April, 1974. It is also the case of the plaintiffs that they have acquired a special right to the exclusive use and advertisement of the carton and a long-standing and assured reputation at the hands of the public for over 30 years. The goodwill and the Trade Mark have put the plaintiff's goods in the market acquiring wide reputation and extensive demand. The defendant, who has been manufacturing the Collyrium has been passing it off as that of the plaintiffs by copying their design, Trade Mark, colouration, print and size, etc., of the carton with all distinctive, exclusive marks of the plaintiffs and he has chosen to give the name as "Eyesol" According to the plaintiffs, the Trade Mark of the plaintiffs is fully exploited to the point of similarity, in all respects except in few details. The important features are :— The eye side hair, eyelashes,, eyebrow, sea of floating eyes, on the front and reverse, and small eye letter design in front of the eye in green and the final special mark in the use of words, as special type of 'eye' (Eyetex). In the beginning, the cartons of the defendant were red, later changed to black and now a clear and full imitation of the plaintiffs in all aspects. According to the plaintiffs the defendant has successfully attempted to deceive the public and there is an infringement of the exclusive Trade Mark as also direct attempt to disrupt the plaintiffs' foothold in the market and has caused loss. It is also the case of the plaintiffs that the defendant has not registered the Mark and is misrepresenting that his carton is genuine and registered under the Act and the special features of the registered Trade Mark of the plaintiffs have been infringed and the buyers are deceived by accepting the spurious one as real. According to the plaintiffs, the defendant had been called upon to produce the genuineness of his Trade Mark which he has failed to do and had evaded. Thus, according to the plaintiffs, the defendant has passed off his goods in the area of Tambaram and suburbs and the city of Madras with the help and connivance of some of the dealers and has infringed the Trade Mark of the plaintiffs by deceptive and colour get-up in the carton, which fully resembles that of the plaintiffs. The defendant by such sale and deception has caused loss in the trade of the plaintiffs and the plaintiffs have incurred setback in the sale in money value nearly to the extent of Rs. 33,570. The plaintiffs have restricted their claim of damages to Rs. 10,000. The plaintiffs issued a notice to the defendant addressed to No. 5, Second Street, Sundaram Colony, Tambaram and the defendant had evaded the receipt of the same. The plaintiffs also filed a criminal complaint against the defendant. The defendant issued a notice, dated 14th June, 1974, to the plaintiffs with all incorrect assertions, but the plaintiffs called upon him to give a declaration that he would not infringe and use the plaintiff's registered Trade Mark. But, the defendant has not done so, but is continuing his act of deception and further infringement and material loss to the plaintiffs. Hence, the plaintiffs have instituted the suit for declaration of their exclusive right to the Trade Mark and for a permanent injunction to restrain the defendant from passing off his goods and also for liquidated damages to the extent of Rs. 10,000.

5. On the other hand, the case of the defendant as contended in his written statement is that he filed an application before the registering authority to register his Trade Mark and there was no intention on his part to deceive or defraud the public and he is doing business in "Eyesol Kanmye" for the past 22 years, *i. e.*, from 1953 and that his product has won many awards from various

exhibitions conducted at Trichi, Tirunelveli and Salem and he had been given gold medals. It is further stated in the written statement by the defendant that the allegations that he has been passing off his product as that of the plaintiffs by copying their design, trade mark, colouration, print and size, etc. is incorrect, that the allegation that the trade mark of the plaintiffs is fully exploited to the point of similarity in all respects is incorrect and that the plaintiffs only are passing off their products as that of the defendant. According to the defendant, a comparison of the carton published by the plaintiffs' predecessor, P. K. Vasudevan, and the carton published by the plaintiffs will clearly go to show that it is only the plaintiffs who have copied the defendant's Trade Mark. It is further contended in his written statement by the defendant that prior to 1954, the Aravind Laboratories advertised a carton wherein the word "Eyetex" was printed in a separate bold letter with a Tamil word "Mye" alongwith the word "Regd", that in the publication made in the "Indian Express", dated 14th October, 1954 by Arvind Laboratories, the carton contained separate eye mark on a white background with Hindi, Telugu words along with registered Trade Mark No. 124824. The said carton contains the word "Eyetex" which is different from those advertised earlier and the six letters in the word "Eye-tex" are closely printed and the letter "Y" is joined to the letter "E" which is copied from the carton used by the defendant. The word "Tex" in the publication made in the year 1954 is separate and distinct, whereas in the present carton, the word "E" was cut only to print the letter "X" and thus there are three different cartons used by the plaintiffs only to deceive the public. The defendants denied the allegations that the special features of the registration of the plaintiff's Trade Mark have been infringed. According to the defendant, the plaintiff's predecessor P. K. Vasudevan, proprietor of Aravind Laboratories to whom the defendant had issued a notice in the year 1954 had published a statement in the 'Indian Express' regarding the 'Eyesol" as withdrawing the same and an apology was published in the 'Indian Express', dated 14th October, 1954. In that publication, he has stated that he had no objection to use the word "Eyesol". The plaintiff's predecessor had registered his "Eyetex" Trade Mark and the present plaintiff has not done anything new towards registration. The plaintiffs are aware of all the correspondence and publications which can be seen in his reply notice sent to the defendant's counsel on 11th July, 1974. The colour and scheme, design and get-up are common to the trade and has been used by many others, such as "Eyeolux" 'Eye-tex" Eye-torch", "Eye-touch", "Eyetek", "Eyetick", and "Eyekiss". According to the defendant, his "Eyesol" design differs completely from that of the plaintiffs and the same is apparent and eye-figure is on the left side of the nose fixed above the nose at the right hand side. The plaintiff's carton shows the eye-design on the right hand side without nose and cheek. The eye in the plaintiff's product is printed in thick black line with dots up and down while the eye in the defendant's product is printed with thin line without any dots. The eyes are facing each other and not on one and the same side and both are easily distinguishable. It is further stated in his written statement by the defendant that the name of the plaintiff's laboratory is distinctly printed in the carton, while the defendant's products do not have that mark and the word "Kanmye" is printed in Malayalam in large and bold letters in his carton which is absent in the plaintiff's carton. The plaintiffs have printed full address in small letters, while in the defendant's products, the words "Eyesol India" are in bold letters inside the circle. The plaintiff's product contains the letters 'E' with No. 1,255 and ends with the letter 'X'. The plaintiffs' predecessor did not complain of any infringement or passing off and the defendant was carrying on the business from 1954. The plaintiff's predecessor has deviated from the original registered Trade Mark and attempted to alter certain features in the carton, but the defendant has never passed off his goods as that of the plaintiffs and had also not infringed the Trade Mark of the plaintiffs. It is also contended by the defendant in his written statement that he had personally prepared all his products without the aid of much labour, and goods are also of efficient quality and therefore, there was absolutely no necessity for him to infringe the Trade Mark of the plaintiffs or pass off his goods. The defendant stated that the plaintiffs are anxious to have a monopoly of trade and

have come forward with the false suit. It is further stated in the written statement by the defendant that the allegation that the plaintiffs have incurred a set-back in their sales during 1973-1975 to the tune of nearly Rs. 33,570 is incorrect and that the defendant is not liable to pay any damages, much less the sum of Rs. 10,000. The plaintiffs had instituted criminal proceedings against the defendant before the Sub Divisional Judicial Magistrate, Poonamallee, under section 429, Indian Penal Code, and during pendency of that case, they have filed the suit. The defendant has further stated that he is a poor business man and he is carrying on the business with the help of his wife, and the plaintiffs have no cause of action to file the suit, and the suit is liable to be dismissed.

6. On the above pleadings, the trial Court framed the following issues :

1. Whether the defendant is passing of his goods as that of the plaintiffs?

2. Whether the defendant is imitating the plaintiffs' Trade Mark andw hether there is any similarity between plaintiffs' carton and defendant's carton to deceive the public?

3. Whether the plaintiffs and their predecessors-in-title have acquiesced in the defendant's using the Trade Mark?

4. Whether the plaintiffs have suffered any damage? If so, what extent?

5. Whether the plaintiffs are entitled to an injunction?

6. Whether there is any infringement of plaintiffs' Trade Mark?

7. Whether the plaintiffs have altered original Trade Mark and copied the defendant's Trade Mark?

8. To what relief, if any, the plaintiffs are entitled?

7. On behalf of the plaintiffs, A. V. Srinivasan, one of the partners of the plaintiff's firm was examined as P. W. 1. P. Ws Nos. 2 to 8 were examined on behalf of the plaintiffs. Exhibits A-1 to A-103 were filed before the trial Court on behalf of th plaintiffs. The defendant examined himself as D. W. 1. D. W. 2, Asamathulla was examined on behalf of the defendant.

8. Under Issue Nos. 1, 2, 5, and 6, the trial Court held that the plaintiffs have got the exclusive right to the said Trade Mark with regard to their product marked as Eyetex. The trial Court also held that the defendant's carton is having an element of similarity and may cause deception to illiterate people who are likely to purchase *Kanmye*. The defendant's carton is deceptively similar to the carton of the plaintiffs which has been registered. The trial Court also held that inasmuch as the defendant's Trade Mark is not a registered one and as the Trade Mark is deceptively similar to the plaintiffs' Trade Mark, which is a registered one, there is infringement of the plaintiffs' Trade Mark by the the defendant and therefore, the plaintiffs will be entitled to injunction. The trial Court held that there was no passing off of the goods of the defendant as that of the plaintiffs. Thus, the trial Court found the Issue No. 1 against the plaintiffs and Issue Nos. 2, 6 and 5 in favour of the plaintiffs Under Issue No 3, the trial Court found that though it can be said that there was no fraudulent representation by the defendant, the defendant cannot claim that there was acquiescence by the plaintiffs' predecessor. Accordingly, the trial Court found the Issue No. 3 in favour of the plaintiffs. Under issue No. 7, the trial Court found that the defendant did not take steps to raise any objection for the alteration before the Registrar of Trade Marks and he had also not objected to the same by issuing any notice to the plaintiffs themselves or to the plaintiffs' predecessor and the plaintiffs having registered their Trade Mark, the defendant cannot have any grievance against the plaintiffs with regard to the same. Thus, the trial Court found the Issue No. 7 in favour of the plaintiffs. Under Issue No, 4 the trial Court found that the plaintiffs have not established their claim for damages against the defendant and answered the said issue against the plaintiffs.

9. Aggrieved by the abovesaid decision of the trial Court, the plaintiffs have come

forward with this appeal *inter alia* contending that the trial Court having found that the defendant had committed infringement of the Registered Trade Mark of the plaintiffs, ought to have awarded damages to the plaintiffs. It is pointed out on behalf of the plaintiffs that the trial Court erred in holding that under Exhibit A-10, the plaintiffs themselves have not raised any objection to the use of the word "Eyesol" According to the plaintiffs-appellants herein in Exhibit A-10, the appellants had not stated that they had no objection to the use of the word "Eyesol", nor had they granted permission to the defendant to use the said word "Eyesol". According to the plaintiffs-appellants herein, the declaration and injunction granted by the trial Court is of a most comprehensive character both in regard to pictoral design of the plaintiffs'-appellants' Trade Mark and verbal representation in the carton, and having granted such a declaration the lower Court erred in granting permission to the defendant to sue the word "Eyesol". It is also contended on behalf of the plaintiffs-appellants herein that the trial Court failed to note that the phonetic similarity of the two marks are so similar that there is danger of confusion between the two marks and the phonetic affinity is likely to deceive or cause confusion. According to the plaintiffs-appellants herein, the trial Court ought to have held that the expression "Eyesol" is phonetically similar to the word "Eyetex" though it had found that the entire mark is deceptively similar.

10. On the other hand, the defendant in his cross-objections has *inter alia* contended that the trial Court had erroneously found that both the marks are deceptively similar, that the trial Court failed to note that the plaintiffs are not the original owners of the Trade Mark and that their predecessor is one Vasudevan, who had written a letter Exhibit B-19 approving the use of the Trade Mark "Eyesol" by the defendant.

11. Mr. R. Kesava Ayyangar, the learned counsel for the plaintiffs-appellants herein contends that the trial Court, having found that the defendant's Trade Mark is not a registered one and as the Trade Mark is deceptively similar to the plaintiffs' Trade Mark which is a registered one and that there is infringement of the plaintiffs' Trade Mark by the defendant and therefore the plaintiffs will be entitled to injunction, ought to have granted the claim for the damages against the defendant. He also contends that the trial Court ought to have granted permanent injunction even with respect to the use of the name "Eyesol" by the defendant on the ground that the trial court is not correct in observing that the plaintiffs themselves have not raised any objection for the use of the name "Eyesol" by the defendant in Exhibit A-10. The learned counsel for the plaintiffs also refers to the provisions of section 2 (1) (*j*) of the Trade and Merchandise Marks Act, 1958 which reads as follows:

> "(*j*). 'Mark' includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral of any combination thereof;"

Referring to this provision Mr. R. Kesava Ayyangar, the learned counsel for the plaintiffs-appellants herein contends that the trial Court ought to have granted a permanent injunction even with respect to the use of the name "Eyesol" by the defendant. The learned counsel for the plaintiffs also refers to the provisions of sections 11, 12, 28 and 29 of the Trade and Merchandise Marks Act, 1958.

12. Mr. R. Kesava Ayyangar, the learned counsel for the plaintiffs-appellants herein refers to the decision in *Durga Dutt Sharma* v. *N. P. Laboratories*[1], for the following propositions:

> "An action for passing off is a Common Law remedy being in substance an action for deceit that is a passing off by a person of his own goods as those of another. But that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of 'the exclusive right to use the trade mark in relation to those goods. The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the *sine qua non* in

1. (1966) 1 S. C. J. 734 : (1965) 1 S. C. R. 737 A. I. R. 1965 S. C. 980.

the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the action might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two cases ceases. In an action for infringement the plaintiff must no doubt make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial, whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff."

The Supreme Court observed in this decision at page 990 in paragraph 29 as follows:

"When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be 'in the course of trade', the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further question arises, for, then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (Vide section 71). A point has sometimes been raised as to whether the words "or cause confusion", introduce any element which is not already covered by the words 'likely to deceive' and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words 'likely to deceive'. But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade for the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascetained by a comparison of the two marks, the degree of resemblance which is necerssary to exist to cause deception not being capable of definition by laying down objective standards. The person who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should however, be borne in mind that the object of enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff."

13. The decision in *Ruston and Hornby Ltd.* v. *Zamindara Engineering Co*[1]., is relied upon for the following proposition :

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1. (1970) S. C. R. 222: (1971) 1 S. C. J. 34; A. I. R. 1970 S. C. 1649.

"In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the Court will not enquire whether the infringement is such as is likely to deceive or cause confusion. But where the alleged infringement consists of using not the exact mark on the Register but some thing similar to it, the test of infringement is the same as in an action for passing off. In other words, the test as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing-off actions."

14. On behalf of the plaintiffs-appellants herein, the decision in *Rochel and Co.* v. *G. Manners and Co.*[1], is relied upon for the following propositions :

"The marks must be compared as a whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark."

It was held in this decision that on comparison of the trade marks "Dropovit" and and "Protovit", that they were not deceptively similar.

15. In this decision *Rochel & Co* v. *G Manners & Co.*[1] the Supreme Court has observed at page 2064 in paragraph 11 as follows :

"In *Parket Knoll Ltd.* v. *Knoll International Ltd.*[2] Lord Denning explained the words "to deceive" and the phrase "to cause confusion" as follows :

'Secondly' to 'deceive' is one thing. To 'cause confusion' is another. The difference is this : When you deceive a man you tell him a lie. You make a false representation to him and thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but still you do it, and so you deceive him. But you may cause confusion without telling him a lie at all, and without making any false representation to him. You may indeed tell him the truth, the whole truth and nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so. The tests for comparison of the two word-marks were formulated by Lord Parker in *Pianotist Co. Ltd's. Application*[1], as follows :

'You must take the two words. You must judge of them, both by their look and by their sound, You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances, and you must further consider what is likely to happen if each of those trade marks is for the goods of the respective owners of the marks. If considering all those circumstances you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods then you may refuse the registration, or rather you must refuse the registration in that. It is necessary to apply both the visual and phonetic tests. In *Aristoc Ltd* v *Rusta Ltd*[2] the House of Lords was considering the resemblance between the two words 'Aristoc' and 'Rusta'. The view taken was that considering the way the words were pronounced in English, the one was likely to be mistaken for the other. Viscount Maugham cited the following passage of Lord Justice Luxmoore in the Court of Appeal which passage, he said he completely accepted as the correct exposition of the law.'

The answer to the question whether the sound of one word resembles too nearly the

1. (1970) 2 S. C. J. 621 : (1970) 2 S. C. R. 213 : A.I.R. 1970) S. C. 2062.
2. (1962) R.P. C. 265 at 274,

1. (1906) 23 R. P. C. 774 at 777.
2. (1945) R. P. C. 65 at 72.

sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for, obviously a person who is familiar with both words will neither be deceived nor confused. It is a person who only knows the one word and has perhaos an imperfect recollection of it who is likely to be deceived or confused. Little assistance therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable pronounced with the clarity to be expected from a teacher of elocution. The Court must be careful to to make allowance for imperfect recollection and the effect of careless pronounciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants. It is also important that the marks must be compared as a whole. It is not right to take a portion of the word and say that because the portion of the word differs from the corresponding portion of the word in the other case, there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. Thus in Lavroma case, *Tokalon Ltd* v. *Davidson and Co.*[1] Lord Johnston said :

'... we are not bound to scan the words as we would in a question of *comparatio literarum*. It is not a matter for microscopie inspection, but to be taken from the general and even casual point of view of a customer walking into a shop'."

16. On behalf of the plaintiffs, the decision in *K. Krishna Chettiar* v. *Ambal & Co.*[2] is relied upon for the proposition that the resemblance between the two marks must be considered with reference to the ear as well as the eye and ocular comparison is not always the decisive test. Therefore, even if there be no visual resemblance between the two marks, that does not matter when there is close affinity of sound between the words which are distinctive features of the two marks. It was also held in that case that merely because the distinctive words used in both the marks have distinctive meanings it cannot be said that the phonetic resemblance does not lead to confusion, when it is likely that majority of the customers are not capable of understanding the fine distinction between the meanings of the two words. The Supreme Court observed in that decision as follows :

"The name 'Andal' does not cease to be deceptively similar, because it is used in conjunction with a pictorial device. The case of *Decordova* v. *Vick Chemical Coy*[1], is instructive. From the Appendix printed at page 2/0 of the same volume, it appears that Vick Chemical Coy. were the proprietors of the registered trade mark consisting of the word "Vaporubu" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve' formed a part. The appendix at page 226 shows that the defendants advertised their ointment as 'Karsote vapour Rub'. It was held that the defendants had infringed the registered marks. Lord Radcliffe said :

'a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods he uses one or more of its essential features'.

Mr. Sen stressed the point that the word 'Ambal' and 'Andal' had distinct meanings Ambal is the consort of Lord Siva and Andal is the consort of Ranganatha. He said that in view of the distinct ideas conveyed by the two words a mere accidental phonetic resemblance could not lead to confusion. In this connection, he relied on Venkateswaran's Law of Trade and Merchandise Marks, 1963 Edition, page 214, Kerly's Law of Trade Marks, and Trade Names. 9th Edition page 465, Article 852 and the decision. Application by Thomas, A Smith Ltd. to register a trade mark, 1913-31 RPC 363 In that

1. 32 R P C 133 at 136.
2. (1970) 1 S. C. J. 203: (1970) 1 An. W. R. (S. C.) 21: (1970) 1 M. L. J. (S. C.) 21: (1970) 1 S. C. R. 290: A. I. R. 1970 S. C. 146.

1. (1951) 68 R. P. C. 102.

case Neville, J., held that the words 'Limit' and Summit' were words in common use, each conveying a distinct idea, definite idea, that there was no possibility of any one being deceived by the two marks; and there was no ground for refusing registration. Mr. Sen's argument loses sight of the realities of the case. The Hindus in the Southern India may be well aware that the words. 'Ambal' and 'Andal' represent the names of two distinct Goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees. Muslims and persons of other religious denominations Moreover, their business is not confined to Southern India. The customers who are not Hindus or who do not belong to Southern India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign Goddess used in connection with the mark They are not likely to remember the fine distinctions between a Vaishnavite Goddess and a Shivaite deity".

17. The decision in *Amritdhara Pharmacy* v. *Satya Deo Gupta*[1] is relied upon by the plaintiffs for the proposition that for deceptive resemblance two important questions are: (1) who are the persons whom the resemblance must be likely to deceive, or confuse; and (2) what rules of comparion are to be adopted in judging whether such resemblance exists. As to confusion, it is perhaps an appropriate description of the state of mind of a customer who, on seeing a mark thinks that it differs from the mark on goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection. In this decision, the Supreme Court observed at page 453 in paragraphs 8 and 9 as follows :—

"Let us apply these tests to the facts of the case under our consideration. It is not disputed before us that the two names 'Amirtdhara' and 'Lakshmandhara' are in use in respect of same description of goods, namely, a medical preparation for the alleviation of various ailments. Such medicinal preparation will be purchased mostly by people who, instead of going to a doctor wish to purchase a medicine for the quick alleviation of their suffering, both villagers and towns-folk; literate as well as illiterate. As was said in *Corn Products Refining Co.* v. *Shangrila Food Products Ltd*[1] the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. To such a man the overall structural and phonetic similarity of the two names 'Amritdhara' and 'Lakshmandhara' is, in our opinion, likely to deceive or cause confusion. We must consider the overall similarity of the two composite words 'Amritdhara' and 'Lakshmandhara'. We do not think that the learned Judges of the High Court were right in saying that no Indian would mistake one for the other An unwary purchaser of average intelligence and imperfect recollection would not, as the High Court supposed, split the name into its component parts and consider the meaning of the composite words as 'current of nectar' or current of Lakshman. He would go more by the overall structural and phonetic similarity and the nature of the medicine he has previously purchased, of has been told about, or about which he has otherwise learnt and which he wants to purchase. Where the trade relates to goods largely sold to illiterate or badly educated persons, it is no answer to say that a person educated in the Hindi language would go by the etymological or ideological meaning and see the difference between 'current of nectar' and 'current of Lakshman' 'Current of Lakshman' in a literal sense has no meaning. To give it meaning one must further make the inference that the current or stream is as pure and strong as Lakshman of the Ramayana. An ordinary Indian villager

1. (1963) 2 S. C. R. 484 : A. I. R. 1963 S. C. 449

1. (1960) 1 S. C. J. 50) : (1960) M. L. J. (Crl.) 418 : (1960) 1 S. C. R. 958 : A. I. R. 1960 S.C. 142.

or townsman will perhaps know Lakshman; the story of the Ramayana being familiar to him, but we doubt if he would etymologise to the extent of seeing the so-called ideological difference between 'Amritadhara' and 'Lakshmandhara'. He would go more by the similarity of the two names in the context of the widely known medicinal preparation which he wants for his ailments.

We agree that the use of the word 'dhara' which literally means 'current or stream' is not by itself decisive of the matter. What we have to consider here is the overall similarity of the composite words, having regard to the circumstance that the goods bearing the two names are medicinal preparations of the same description. We are aware that the admission of a mark is not to be refused, because unusually stupid people, "fools or idiots", may be deceived. A critical comparison of the two names may disclose some points of difference but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the medicine he is looking for with a somewhat vague recollection that he had purchased a similar medicine on a previous occasion with a similar name. The trade mark is the whole thing—the whole word has to be considered.

In the case of the Application to Register 'Erecktiks' (opposed by the proprietors of the trade mark 'Erector') Farwell, J said in *William Bailey (Birmingham) Ltd.'s Application.*[1]

'I do not think it is right to take a part of the word and compare it with a part of the other word; one word must be considered as a whole and compared with the other word as a whole . . . I think it is a dangerous method to adopt to divide the word up and seek to distinguish a portion of it from a portion of the other word."

18 On the question of damages for infringement, the learned counsel for the plaintiffs refers to the decision in *Juggi Lal* v. *Swadeshi Mills Co.*[1] for the proposition that there is no cut and dry rule which can be laid down by a Court of law for the estimation of damages in a case of infringement of trade-mark. But instead of making a speculative assumption of sales by defendant by trusting to their own goods without the misleading trade-mark the safer basis would be to calculate on the falling-off in plaintiff's trade which came in after the pirated mark was introduced on the market. The decision in *Ruston and Hornby Ltd.* v. *Zamindara Engineering Co.*,[2] is referred to by the learned counsel for the plaintiffs appellants herein to show that in the said decision, the appellant therein was also granted a decree for nominal damages to the extent of Rs. 100. In the said case, the appellant was granted a decree restraining the respondent therein by a permanent injunction from infringing the plaintiffs' trade mark "Rustom" and from using it in connection with the engines, machinery and accessories manufactured and sold by it under the trade mark of "Rustom" or "Rustom India". In the said decision the Supreme Court also observed that the appellant was also entitled to an injunction restraining the respondent and its agents from selling or advertising for sale of engines, machinery or accessories under the names of "Rustom" or "Rustom India". The appellant was further held to be entitled to an order calling upon the respondent to deliver to the appellant price-lists, bills, invoices and other advertising material bearing the mark "Rustom" or "Rustom India".

19. Mr. R. Sundararajan, the learned counsel for the defendant *inter alia* contends that the plaintiffs have not objected in the plaint to the use of the name "Eyesol" by the defendant. He also contends that the plaintiffs have not let in evidence to show that the use of the name "Eyesol" by the defendant is an infringement of the trade mark of the plaintiffs. In other words, the contention of the defendant is that the plaintiffs have not established that the confusion has arisen in the minds of the customer or deception had been committed by the defendant on account of his using the

1. (1935) 52 R. P. C. 136.

1. 29 L. W. 243 : 56 M. L. J. 282 : 56 I. A. 1; A. I. R. 1929 P. C. 11.
2. (1971) 1 S. C. J. 34 : (1970) 2 S. C. R. 222: A. I. R. 1970 S. C. 1649.

name "Eyesol" for his products. It is also contended on behalf of the defendants that the plaintiffs have not let in evidence to show that the name "Eyesol" has been used by the defendant after the registration of the trade mark by the plaintiffs. It is further contended on behalf of the defendant that the assessment order passed by the Commercial Tax Authorities such as Exhibits A-38, A-39, A-40 and 41, are not only with respect to the dealings of the plaintiffs with regard to "Eyetex" but also with respect to Aravind Instruments, etc. It is also pointed out on behalf of the defendant that Exhibits A-77 to 82-A bills issued by Ganesh Publicities were for the advertisement charges incurred by the plaintiffs with respect to "Eyetex" only. It is contended that the plaintiffs have not let in evidence to prove specifically the expenses incurred with respect to manufacture and sale of "Eyetex" alone. It is also pointed out by the learned counsel for the defendant that Exhibits A-53 to A-56 which are assessment orders and notices of demand by the Income-tax Officer issued to the plaintiffs do not relate to the profits made by the plaintiffs with respect to "Eyetex" alone.

20. The learned counsel for the defendant also refers to the decision in *Rustom and Hornby Ltd* v. *Zamindra Engineering Co.*[1], *F. Hoffmann, La Roche and Co. Ltd.* v. *Geoffrey Manners and Co.. Private Ltd*[2]. *K. R. Chinna Krishna Chettiar* v. *Sri Ambal & Co., and another*[3] *Kaviraj Pandit Durga Dutt Sharma* v. *Navaratna Pharmaceutical Laboratories*[4] and *Amritdhara Pharmacy* v. *Satya Deo Gupta*[5].

21. The learned counsel for the defendant refers to the decision in *K. R. Chinna Krishna Chetty* v. *K. Venkatesa Mudaliar and another*[6] for the following observation :

> "Though at one stage we considered that the addition of the word 'Radha' to the legend 'Sri Andal' makes all the difference, after our attention was drawn to the three cases referred to above, *viz,* (1) relating to the Vick Vaporub, where the objection to the registration of the respondents Vaporub which infringed the appellant's registered mark was sought to be got over by adding a word 'Karosote to the respondents' legend, and; (2) where the objection to the registration of the respondent's trade mark 'Rustom' was sought to be met by the addition of the word 'India' to the objected legend and (3) where the word "Bulova" was sought to be added to the legend "Accutron" which legend was held to infringe the respondents' trade mark "Accurist" we are persuaded to come to the opposite conclusion that the addition of the word 'Radha' to the legend 'Sri Andal' will not make the slightest difference and that the view of the learned Judge is correct. The appellant's snuff sold under the trade name 'Sri Andal" the registration of which was objected to by the respondents, has been in the market for some years and the objection to its registration has now been finally upheld. The question for consideration now will be whether the addition of the word 'Radha' to the objected legend makes a vital difference - when the two marks are compared side by side the question will be whether the addition of the word will make any vital difference. As observed by Stamp, J., in 1969 R. P C. No. 102 at p. 109, where imperfect recollection is relevant what has to be considered is how far the additional word is significant to prevent imperfect recollection and the resultant confusion. We are of the opinion that the combination of the two words 'Radha's Sri Andal' is likely to be taken by snuff-users as the snuff manufactured and marketed by the appellant originally as 'Sri Andal. The appellant's learned counsel sought to distinguish the above three cases on the ground that in the aforesaid decisions the new word sought to be added was only the name of the country of manufacture while in the present case, the addition of the word 'Radha' to the legend 'Sri Andal' is a combination which has nothing in common with the respondent's legend "Sri Ambal." We are unable to accept the ground of distinction made by the learned counsel

1. (1971) 1 S. C. J. 34 : A. I. R. 1970 S. C. 1649.
2. (1970) 2 S. C.J. 621: A. I. R. 1970 S. C. 2062.
3. (1970) 1 S. C. J. 203 : A. I. R. 1970 S. C. 146.
4. (1966) 1 S. C. J 731 : A. I. R. 1965 S. C. 980.
5. (1963) 2 S. C R. 484 : A. I. R. 1963 S. C 449.
6. (1973) 2 M. L. J. 98: A. I. R 1974 Mad. 7.

We are of opinion that there is a tangible danger that a substantial number of persons will confuse the appellants 'Radha's Sri Andal, mark applies for with the respondents legend 'Sri Andal snuff".

22. The decision in *V. R. Subramaniyam* v. *Balasubramaniam*[1] is relied upon by the learned counsel for the defendant for the following propositions :

"A mark would be prohibited whether there was an intention or not to deceive or cause confusion provided the mark was likely to deceive or cause confusion. Confusion might be caused even by telling the truth. Confusion might be caused in the purchasers mind through want of knowledge or ability on his part to distinguish. Whether or not any degree of resemblance likely to deceive or cause confusion existed was a question for the Court to decide upon evidence in each case. The accepted rules of comparison might be stated as follows : (*i*) The two words should be taken and both of them should be judged by their look and by their sound. (ii) The goods to which they were to be applied and the nature and kind of customer who was likely to buy these goods should be considered (iii) All the surrounding circumstances and what was likely to happen if each of the marks was used in a normal way as a trade mark for the goods of the respective owners of the marks should also be considered. The marks might be considered as a whole as the true test was whether the totality of the impression given both orally and visually was such that it was likely to cause mistake, deception or confusion. In the instant case, the words *Raja* and *Roja*, when taken together and judged by their look do not look alike. They were not also similar by sound. The kind of customer who was to buy the goods (cosmetic) was not likely to mistake one mark for the other as there was no great similarity between the two marks. If both the marks were used in a normal way it could not be said that a person was likely to be misled or there would be confusion or deception in the mind of the person who was likely to buy these goods."

23. The learned counsel for the defendant refers to the decision in *Mount Mettur Pharmaceutical Ltd.* v. *Ortho Pharmaceuticals Corporation*[1] in which it was held that "Utogynal" in relation to medicinal preparation is not likely to cause confusion with "Ortho-Gynol" (registered as trade mark). It was also held in the said decision that comparison of the two words not only syllable for syllable but as a whole shows that the total sound effect of the words lacks any similarity. So also when the words are written down and compared, they do not have any similarity which can deceive the eye of the layman.

24. The decision in *Mount Mettur Pharmaceuticals (P.) Ltd.* v. *Dr. A. Wander*[2] is relied upon by the learned counsel for the defendant for the proposition that the primary tests are that the words should be judged by their look and by their sound In this case it is held that there is no similarity in the goods by their look and that "Asthmix" and "Asmac" are not similar in sound and are not likely to confuse any person.

25. The decision in *Parle Products (P.) Ltd.* v. *J. P. and Co., Mysore*[3] is relied upon for the following observation of the Supreme Court in paragraph 9 at page 1362 :

"It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case, we find that the are packets practically of the same

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1. (1966) 2 M. L. J. 570 : I. L. R. (1966) 2 Mad. 288; 79 L. W. 525 : A.I.R. 1967 Mad. 186.

1. (1975) 1 M. L. J. 103: A.I.R. 1925 Mad. 74.
2. (1977) 1 M. L. J. 21: 90. LW. 386: A.I.R. 1977 Mad. 105
3. (1973) 3 S. C. C. 432: A. I. R. 1972 S. C. 1369.

size, the colour scheme of the two wrappers is almost the same, the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence The words "Gluco Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who had a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before.. If one was not particular enough to note the peculiar features of the wrapper on the plaintiffs goods, he might easily mistake the defendant's wrapper for the plaintiff's if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendant's wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many other there was absence of it".

26. Thus, for deciding a dispute regarding infringement of a Trade Mark, the following propositions of law are relevant:

(1) In deciding whether the alleged infringing trade mark is likely to cause confusion in the trade or not, it is the totality of the trade mark which has to be kept in view.

(2) Initial burden of showing that the defendant's mark is likely to deceive or cause confusion lies on the plaintiffs who want to restrain the user of the alleged infringing mark. If any resemblance is found to exist between the two marks, it is then for the defendant to show that the two marks are so dissimilar that there is no reasonable probability of any considerable section of the public being deceived.

(3) For deciding a dispute about the infringement of a trade mark, the Court has to have regard to the way in which the infringing trade-mark will appear when it is placed on the goods of the owner of the registered trade mark. If the Courts come to the conclusion that an ordinary purchaser of the goods in question cannot be able to distinguish between the offending mark and the registered mark, the Court will be justified to come to a conclusion in favour of the registered owner of the trade mark.

(4) The question of possibility of confusion is not to be decided on the basis of a person looking at the two trade-marks side by side but on the basis that normally a customer will see one trade-mark in the absence of the other and will have to make up his mind about the trade-mark before him being one he is looking for or not in the light only of his general recollection of what the nature of the trade-mark sought for by him was. In deciding the question of similarity between the marks, the Court has to approach the subject from the point of view of a man of average intelligence and of imperfect recollection. The trade mark is the whole thing, that is the total thing registered, and it is the whole thing or the whole word which has to be considered.

(5) The resemblance, between the two marks may be phonetic, may be visual, may be auditory, or may lie in the meaning of word or mark.

27. Bearing in mind the above principles of law, let me discuss the evidence available on record book oral and documentary.

[The discussion relating to evidence and facts, omitted — Ed.]

* * * * *

41. The point for consideration is whether there is infringement of the registered trade

mark of the plaintiffs by the defendant. In other words, it has to be seen whether there is similarity between the plaintiffs' carton and the defendant's carton. Now both the cartons are available before the Court. We have seen that it has been held that the test of comparison of marks side by side is not a sound one, since the purchaser will seldom have the two marks actually before him when he makes his purchase. So the two cartons have to be scrutinised bearing in mind the said principles. Exhibit A-1, dated 11th September, 1946, is the certificate of registration of the Trade Mark of the plaintiffs' predecessor bearing No. 124825 issued in the name of the plaintiffs and in the annexure, the entire carton is affixed and it is also in black colour. Exhibit A-3 is a portion of the carton of the plaintiffs in green colour with the letters in black and Exhibit A-4 is the entire carton of the plaintiffs. Exhibit A-5 is the carton of the defendant. Exhibit A-6 is another carton bearing the name 'Eyesol" and according to the plaintiffs, it is the carton of the defendant. But the defendant has denied the same and there is no acceptable evidence available on record to show that the defendant ever printed such a carton with regard to his product. Exhibit A-94 is the certificate issued by the Registrar of Trade Marks under section 75 of the Trade Marks Act, 1940 dated 20th June, 1951 in favour of P. K. Vasudevan. In the annexure to Exhibit A-94, the portion of the carton in green colour is found affixed.

42. The learned counsel for the defendant contends that there are various points of dissimilarity between the two cartons as stated in the written statement filed by the defendant. According to him, the defendant in his products has printed the word "Kanmye" in Malayalam language in large and bold letters which is absent in the plaintiffs' carton and at the back of the plaintiffs' carton, the full address of the plaintiff's is given in a circle in small letters whereas the defendant has printed the words "Eyesol" India in bold letters inside the circle and likewise he has also stated that in the defendant's carton left-side eye with the nose fixed above, the nose at the right-hand side is shown, is while in the plaintiffs' carton right-hand side of the nose fixed above the nose at the left hand side is shown and the eyes are facing each other in the two cartons and both are not on one and the same side and they are easily distinguishable. In this regard, the learned counsel for the defendant contends that such differences have already been pointed out in the reply notice sent by the defendant to the plaintiffs under Exhibit A-98 dated 29th July, 1974. We have already seen that the question of infringement of plaintiffs' trade mark must be answered in relation to the plaintiffs' trade mark as a whole and not to particular parts of them. It is relevant in this connection to note that the above mentioned dissimilarities pointed out by the defendant can be noticed only by placing the above two cartons side by side and for a casual purchaser, the distinctions and dissimilarities may not be clear. I am convinced that the defendant's carton is certainly deceptively similar to the carton of the plaintiffs which has been registered. The carton of "Eyesol" in Exhibit A-5 is certainly bearing the features of deceptive similarity with the carton in Exhibit A-2 which is registered, in repect of colour, design and get up. Any person who wants to purchase "Eyetex" manufactured by the plaintiffs will get confused and misled when "Eyesol" product kept in Exhibit A-5 carton is offered to him by the dealer. I am certainly of the opinion that the carton of the defendant may cause deception to persons who like to purchase kanmye.

43. It is relevant in this connection to note that the plaintiffs filed cases against one Thakkar, the Proprietor of Pushpa Perfumes, Thiruvottiyur High Road, Madras in this Court in C. S. No. 62 of 1963 and 65 of 1961 for infringement of their trade mark and for permanent injunction restraining the said Thakkar from selling his products by infringing the trade mark of the plaintiffs. Exhibits A-95, A-96 are the copies of the compromise decree issued in the two cases. The plaintiffs have also filed a certificate of validity of the Trade Mark issued by the High Court in C.S. No. 65 of 1961. It is seen that

the trade mark of the plaintiffs is a valid registered Trade Mark and the plaintiffs have got exclusive right to the said Trade Mark with regard to their product marketed as "Eyetex."

44. It is contended on behalf of the defendant-respondent herein that even in the year 1954, the plaintiffs' predecessor in trade issued a warning notice in the 'Indian Express' dated 21st September, 1954 regarding the infringement of his trade mark and the defendant gave a reply to the same. The defendant has not filed any copy of the said reply and the original is not available before the Court. The defendant, however has filed the reply notice sent by P. K. Vasudevan which has been marked as Exhibit B-19. I have already extracted the relevant portion of the contents of Exhibit B-19. Exhibit B-2 newspaper publication was given by the plaintiffs' predecessor after the reply was received from the defendant. The contents of Exhibit B-19 and Exhibit B-2 show that the defendant had informed that his Trade Mark had been registered On behalf of the plaintiffs it is contended that such representation was made by the defendant fraudulently, and therefore, the plaintiffs' predecessor had not raised any objection for the use of the trade mark by the defendant and the same cannot amount to acquiescence by the plaintiffs for the defendant's use of the trade mark. On a careful consideration of the entite evidence available on record, I find that the defendant cannot claim that there was acquiescence by plaintiffs' predecessor for the defendant's use of the trade mark.

45. It is contended on behalf of the defendant that originally the plaintiffs' predecessor had registered the carton with the word "Eyetex" printed in separate bold letters with the Tamil word "Mye" along with the word "Regd."; the eye mark is in a white background with Hindi, Telugu words and the word "Eyetex" is printed separately and only subsequently the letter "Y" is closely printed and joined with the letter 'E' and the same has been copied from the carton used by the defendant. It is also pointed out that there is difference in the manner in which the word "TEX" is printed in the crton of the year 1954 and that is found in the present carton. It is relevant in this connection to note that the defendant did not raise any objection for any such alteration before the Registrar of Trade Marks. The defendant had also not objected to the same by issuing any notice to the plaintiffs or to the pliaintffs' predecessor. The plaintiffs have registered the present trade mark.

46. Mr. R. Sundararajan, the learned counsel for the defendant contends that originally when the plaintiffs' predecessor registered the trade mark, the carton was black in colour and later on only, the plaintiffs have changed the same into green colour and that the defendant has been using the same carton ever since the year 1954. In this regard, the learned counsel for the plaintiffs points out that under the provisions of section 10 (2) of the Trade and Merchandise Marks Act, 1958, the trade mark is deemed to be registered for all colours and the plaintiffs' predecesssor has registered the trade mark even in the year 1949 whereas the defendant claimed to have started the business only in the year 1953. Therefore, it cannot be held that the defendant had been using the trade mark prior to the use of the trade mark by the plaintiffs. D. W. No. 1 has stated in his evidence that he had approached one L. R. Swami for registration of his trade mark and that the said L. R. Swami had promised to get the trade mark of the defendant registered in due course and subsequently, the said L. R. Swami had died. Exhibit A-99, the letter written by the Examiner of Trade Marks to the advocates of the plaintiffs shows that the application bearing No. 163085 was abandoned and destroyed and as such no certified copy of the same can be furnished. It is been from the evidence that the defendant had been doing the business only from the year 1953 and not earlier to that. Merely on the ground that the plaintiffs' predecessor in trade had expressed no objection for the defendant's products, it cannot be held that there has been no infringement of the Trade Mark of the plaintiffs by the defendant because the defendant's trade mark is not a registered one. In the instant case, we find that the cartons are practically of the same size, colour scheme of the two wrappers is almost the same; the design on both, though not identical bears such a close resemblance that one can easily be mistaken for the other. In the circumstances, I hold that there is infringement of the plaintiffs, registered

trade mark by the defendant and therefore, the plaintiffs are entitled to an injunction.

47. In the plaint, the plaintiffs have claimed damages from the defendant to the extent of Rs. 10,000. Though the actual damages according to the plaintiffs, amounts to more than Rs. 33,000 they restricted their claim to Rs. 10,000. As seen above, the plaintiffs have filed the account books showing the sales and also extracts from the account books and assessment orders passed by the Commercial Tax Department as well as the Income-tax Department. The plaintiffs have also examined their printer and filed several orders placed for printing the cartons and other leaflets. It is the case of the plaintiffs that their trade has been affected by the infringement of the trade mark by the defendant. Exhibit A-11 is the comparative sales statement, regarding Madras City sales from April, 1973 to March 1974. P. W. 6 the Accountant of the plaintiffs has stated that various other products of collyrium are being sold in various trade names and the same can be seen from Exhibit B-8 to Exhibit B-18. It is relevant in this connection to note that the plaintiffs besides manufacturing Eyetex are also manufacturing other beauty aids and their total turnover is assessed on the sales of their entire products. The defendant has stated in his evidence that he is manufacuring his product in a small scale. The trial Court has found that plaintiffs themselves had not raised any objection for the use of the name "Eyesol", by the defendant as seen from the contents of Exhibit A-10 and as such, the defendant will be free to use the name "Eyesol" by printing the same in a different manner from that of the plaintiffs. The relevant passage in Exhibit A-10 reads as follows :

> We are also instructed to add that our clients' objection against your clients' Eyesol Trade Mark is not directed towards the word EYESOL *per se*, but to the colour scheme, design, lay out and get-up of the carton in which your clients' EYESOL product marketed as already pointed in paragraph 4 of ours, Registered Notice, dated 8th June, 1974.

From the above passages, it cannot be spelt out that the plaintiffs have no objection for the defendant's trade mark "Eyesol" or that the plaintiffs have granted permission to the defendant for using the name "Eyesol" for their products. Section 2 (1) (*j*) of the Trade and Merchandise Marks Act, 1958 defines 'mark' as including a device, brand, heading label, tickets, name, signature, word, letter or numeral or any combination thereof. As it is also with the name, the registered trade mark of the plaintiffs has been infringed, the defendant cannot be allowed to use the name "Eyesol" for the products manufactured by him. By using the name "Eyesol" in Exhibit A-5, the defendant has infringed the registered trade mark of the plaintiffs. Therefore, I hold that the defendant is not entitled to use the name "Eyesol"

48. On a careful scrutiny of the accounts and assessment orders relied on by the plaintiffs, I hold that the plaintiffs have sustained damages due to the infringement of their trade mark by the defendant. Yet, they have not proved that they are entitled to claim Rs. 10,000 towards damages. In these circumstances, for the infringement of their registered trade mark by the defendant the plaintiffs can be given only nominal damages.

49. In the result, there will be a decree in favour of the plaintiffs restraining the defendant or his agents by a permanent injunction from using the trade mark similar to the registered trade mark of the plaintiffs-appellants as shown in E xhibit. A-5 attached to the decree of the lower Court so as to be deceptively similar, in particular by using the word "Eyesol" or any other word deceptively similar to the word "Eyetex", the registered trade mark of the plaintiffs-appellants, and from selling, offeraing for sale, passing off or attempting to pass off their collyrium preparations, so as to be likely to deceive, or cause confusion whe thused in relation to the goods which are of the same description as the goods for which the plaintiffs'-appellants' trade mark was registered. The plaintiffs are also granted a decree for nominal damages to the extent of Rs 100. The appeal preferred by the plaintiffs is allowed to the extent as ithecated above. Cross-objections filed by ms-defendant is dismissed. In the citcuear tances, the parties are directed to bear their own costs, in this appeal.

R, S, —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P.R. Gokulakrishnan, J.*

Ponnuswamy Nadar .. *Petitioner* *

v.

Ananthappa Nadar and another .. *Respondents.*

Civil Rules of Practice, rule 135 (3) — *Rule allowing seven days' time for deposit of printing charges for printing judgments—Court not fixing any time —Deposit however made within seven days—Whether the time has to be excluded or not while computing limitation in filing appeals to High Court—Time taken may be excluded.*

The printing charges for printing judgment were called for by the lower Court on 28th October, 1978, and they were deposited on 4th November, 1978. The Court did not fix any time for deposit but under rule 135 (3) of the Civil Rules of Practice seven days' time was allowed. The question is whether the time taken for deposit of the printing charges has to be excluded or not while computing the limitation in filing appeals to the High Court.

Held: Rule 135 (3) of the Civil Rules of Practice allowed seven days' time for the party concerned to deposit the printing charges. Though the lower Court did not fix any time, the time taken for depositing the printing charges was within the period contemplated under rule 135 (3) and might be excluded in computing limitation for filing appeal. [*Para.* 2.]

Case referred to : —

Javvaji Venkateshwarlu, In re, (1974) 1 An.W.R. 108: A.I.R. 1974 A.P. 319.

P.M. Sundaram and *S. Subbiah*, for Petitioner.

The Court delivered the following

JUDGMENT.— The question is whether the time taken in the lower Court for depositing the printing charges called for, has to be excluded or not while computing the limitation in filing appeals to this Court. Rule 135 (3) of the Civil Rules of Practice, governing compulsory printing of judgments and orders, allows seven days' time from the date of notice for a party to deposit the amount called for, for the purpose of printing the judgment. In this case, the printing charges were called for by the lower Court on 28th October, 1978 and the printing charges were deposited on 4th November, 1978. Admittedly the printing charges have been deposited within seven days as allowed by the Rule. In In re, *Javvaji Venkateshwarlu*[1], it is stated as follows: —

> "As is indicated in rule 127 of Civil Rules of Practice, where the copy applications are not accompanied by requisite number of stamp papers or requisite amount of printing charges, the Civil Rules of Practice contemplate only calling for such stamp papers or printing charges within a particular period fixed by the Court. If the stamps are filed or charges are paid within that time fixed, the party must be deemed to have complied with that direction of the Court. If the party complies with that direction on the last date of the period (granted) by the Court, he is deemed to have complied with the Court direction on the first day of the direction, and the time taken for compliance by the party shall be time taken by the Court as time requisite for supplying copies."

2. As far as the present case is concerned, no doubt, the Court has not fixed any time for depositing the printing charges. But rule 135 (3) of the Civil Rules of Practice allows seven days' time for the party concerned to deposit the printing charges. On an analogy, we can take it that the decision of the Andhra Pradesh High Court cited supra will squarely apply to the facts and circumstances of the present case. In that view, the time taken for depositing the printing charges —in this case the same is within the period contemplated under rule 135 (3)— may be excluded. After excluding the period, if the office finds that the filing is in time, the appeal may be numbered or otherwise, necessary petition may be insisted upon for excusing the delay.

S.J. ——— *Ordered acordingly.*

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* S.A.S.R.No. 20104 of 1979 against A.S. No. 210 of 1975. *27th June*, 1980.

1. (1974) 1 An.W.R. 108: A.I.R. 1974 A.P. 319.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail, C.J. and V. Ratnam, J.*

Soodalai Ammal .. *Petitioner**

v.

Sachidanandam Pillai and others .. *Respondents*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) *— Surrender of excess land by limited owner — Rights of the remainderman — Whether and how affected by such surrender.*

The provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) indicate that the choice of either retention or surrender of surplus lands rests entirely with the person against whom proceedings under the Act are taken without reference to the interest of any person in those lands. Statutorily, therefore, the person who is proceeded against under the provisions of the Act is the person who is given the choice to specify the land to be retained as well as the land to be surrendered. In this, the provisions of the Act as they now stand, do not permit the remainderman to object to the retention or surrender of a particular item. This again further indicates that irrespective of the nature of the interest of the remainderman in the properties held by a limited owner to whom the provisions of the Act are applied, such limited owner can even surrender the properties in which the remainderman has an interest. The limited owner is compensated by payment of interest for deprivation of possession by the application of the Act, while the remainderman is given the benefit of compensation deposited, when the estate falls into possession or he becomes entitled to the same and such compensation obviously is in lieu of the land in which he has an interest as remainderman and which is lost to him by reason of the application of the provisions of the Act, to a person who falls within the definition of a 'limited owner'. The provisions of the Act do trench upon the interest of the remainderman. In the light of the other provisions of the Act, it cannot be claimed that such interest cannot be touched by the provisions of the Act or in other words the interest of the remainderman is wholly outside the scope of the Act. The Act deals with and imposes a ceiling on land without reference to the subordinate or lesser interest therein created in favour of a different person. If, lands in which another person has interest as a remainderman, can, for the purposes of the Act be treated as land comprised in the holding of a limited owner, how can such land cease to be land for purpose of surrender? In considering whether the remainderman would be subject to the provisions of the Act, the extent of the lands in which he has interest as a remainderman need not be taken into account during the lifetime of the owner. It has also to be remembered that a remainderman is neither a full owner nor even a limited owner as defined in the Act and does not claim through a "limited owner". Till the actual determination of the interest of the "limited owner" and the falling into possession of the remainder, the holder of such an interest does not become a full owner of the lands. Inasmuch as the lands in a holding in excess of the celilng in which any other person has interest as remainderman can be subjected to the provisions of the Act even in the hands of a person who does not answer to the description of a "full owner"; such lands need not be included or taken into account in computing the holding if any, of the remainderman during the lifetime of the "limited owner." After the application of the provisions of the Act to the limited owner and the declaration of surplus the lands in the permitted holding of the limited owner in which the remainderman may have an interest, will again, after the termination of the life interest, along with the other lands, if any, of the remainderman, be subjected to the ceiling law. It is therefore quite conceivable that the limited owner in the first instance and later the remainderman "as full owner" may be subject to the provisions of the Ceiling Act but that is no ground to say that the "limited owner" or remainderman as such are totally outside the Act. In the absence of any specific provision in the Act, it cannot be a matter of assumption that the interest of the remainderman would not be within the scope of the Ceiling Act. The consideration that the remainderman is likely to be deprived of the property *in specie* on the application of the provisions of the Act to a holding in the hands of a limited owner and that he may be entitled to only a monetary compensation in lieu thereof cannot be a ground to hold that the remainderman has got rights in the property taking advantage of which he can object to the surrender

* C.R.P. No. 3355 of 1976. *2nd May*, 1980

by the limited owner of lands in which he has a vested remainder. The payment of compensation to the remainderman on the termination of the interest of the limited owner may be poor consideration so far as his interests are concerned as his claim to the land as such is not given effect to, but that is the result of the operation of the provisions of the statute. As per the provisions of the Act as they are, the interest of a remainderman can, by the application of the provisions of the Act to a limited owner, be interfered with, though the remainderman himself or herself, may not be the person to whom the provisions of the Act are applied. [*Para.* 5.]

Case referred to :—

Krishnaswami Mudaliar v. *Authorised Officer*, (1973) 2 M.L.J. 25: 86 L.W. 206 : A.I.R. 1973 Mad. 453.

Petition under section 83 of the Tamil Nadu Land Reforms Act (LVIII of 1961) read with section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Land Tribunal (Principal Subordinate Judge), Tiruchirapalli, dated 29th July, 1978 and made in L.T,C.M.A. No. 13 of 1977 (No. M.R.I. 206/695/T.R.J.) 17 of 1970 dated 25th June, 1977 on the file of the Authorised Officer, Land Reforms, Tiruchirapalli).

K. Sarvabhauman and *K. Sampath*, for Petitioner.

The Govt. Pleader, *S. Thiagaraja Ayyar* and *N. Vanchinathan*, for Respondents.

The Judgment of the Court was delivered by

Ratnam, J.—This civil revision petition arises out of proceedings under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) as amended, hereinafter referred to as the Act. In the course of the enquiry held by the Authorised Officer it was found that the petitioner was in possession of an extent of 24.65½ ordinary acres equivalent to 22.007 standard acres as on 15th February, 1970 and that an extent of 1.963 standard acres was in surplus. The petitioner had also indicated that four items of properties *viz.* S.No. 143/5—0.77 cents; S.No.125/4—1.06 acres; S.No. 180/2—0.12 cents and S. No. 191—0.41½ cents in Kulamani village may be declared as surplus lands. The first respondent raised an objection with reference to the items sought to be surrendered by the petitioner on the ground that the petitioner has only a life interest and that he is entitled to the remainder in two items of properties *viz.*, S.F. No.125/4 and S.F. No.143/5 and therefore, these two items must be included within the ceiling area of the petitioner. This objection was rejected by the Authorised Officer, who passed an order to the effect that the compensation amount for these two items of properties will be kept in deposit and that the interest thereon will be given to the petitioner for her lifetime and the compensation amount will be paid to the first respondent after the death of the petitioner. Aggrieved by this, the first respondent preferred an appeal in (C.M.A. No. 36 of 1975 to the Land Tribunal) Principal Subordinate Judge), Tiruchirapalli. By order dated 15th Aprill, 1976, the matter was remanded by the Land Tribunal to the Authorised Officer for fresh disposal. Pursuant to this, the matter was again reconsidered by the Authorised Officer (Land Reforms), Tiruchirapalli. By order dated 25th June, 1977, the Authorised Officer held that under the provisions of the Act, a landowner having absolute or limited ownership in the land can offer any land as surplus and that the only basis on which the land so offered can be rejected is that the land is not capable of easy and convenient enjoyment or its utility had otherwise been diminished by the wilful act of the landowner. Therefore, the objections put forth by the first respondent herein were again negatived and the Authorised Officer directed the preparation of the final statement and the publication thereof. Against this order, the first respondent preferred C.M.A. No. 13 of 1977 to the Land Tribunal (Principal Subordinate Judge), Tiruchirapalli. The Land Tribunal, by its order dated 29th July, 1978, purporting to apply the decision of this Court in *Krishnaswami Mudaliar* v. *Authorised Officer, Madras Land Reforms, Cuddalore*,[1] and holding that if the lands agreed to be surrendered by the petitioner are treated as surplus, the first respondent will be deprived of those lands but that he will be entitled only to the money compensation after the lifetime of the petitioner, directed that S.F. No. 125/4 and S.F. No. 143/5 of Kulamani village be included within the ceiling area of the petitioner. It is against this order the petitioner has come up in revision before this Court contending that the choice of lands to be surrendered by an "owner" within the meaning of the Act is unfettered and that it is not open to the first

1. (1973) 2 M.L.J. 25: 86 L. W. 206: A.I.R. 1973 Mad. 453.

respondent to object to her surrendering any lands in which he may beve any interest as a remainderman.

2. When this civil revision petition came up for hearing before one of us, having regard to the importance of the question raised, namely, whether the interest of a remainderman can be reached under the provisions of the Land Reforms Act, while applying them to the case of a limited owner, the matter was directed to be posted before a bench in order to have an authoritative pronouncement on this question and that is how the matter comes up before us.

3. The principal contention raised by the learned counsel for the petitioner is that having regard to the scheme and provisions of the Act, a person in the position of the petitioner who is a "limited owner" for purposes of the Act has a right to surrender whatever lands she thinks fit and that her choice in that matter cannot be restricted or otherwise fettered merely because another person has also an interest in those properties as a remainderman. *Per contra* the learned counsel for the first respondent strenuously contends that the effect of recognising an unfettered right on the part of the petitioner to surrender lands would be to deprive the remainderman of the property *in specie* and that money compensation certainly cannot be equivalent to the property itself at a time when the property falls into possession of the remainderman.

4. In order to appreciate the rival contentions, it is necessary to advert to some of the definitions in the Act as well as other related provisions therein, as a decision on the question has to be rested solely on specific statutory provisions in this regard and not on general considerations in law applicable to a situation like the present. Section 3 (33) of the Act defines an "*owner*" thus :

"*Owner*" (*a*) means

(i) any person holding land in severalty or jointly or in common under a ryotwari settlement or in any way subject to the payment of revenue direct to the Government; or

(ii) a landholder as defined in the Madras Estates Land Act, 1908 (Madras Act I of 1908), or a ryot as defined in that Act; or

(iii) an inamdar not being a landholder defined as aforesaid; and

(b) includes ....

(i) *Full owner or limited owner*, or

(ii) the lessee of any lease-hold village or his heirs, assignee, legal representatives or persons deriving rights through him."

It is thus obvious that for purposes of the Act an "owner" would include a full owner or a limited owner. The expression "*full owner*" has been defined under section 3 (16) of the Act as meaning a person entitled to the absolute proprietorship of land. Section 3 (28) defines "*limited owner*" as any person entitled to a life estate in any land and includes persons deriving rights through him. An explanation has been appended to this definition by Tamil Nadu Act XXXIX of 1972 to the effect that a person who has a right to enjoy the land during his life time shall be deemed to be a limitedowner notwithstanding that he has no power of alienating the land. According to section 3 (19) of the Act, "*to hold land*" with its grammatical variations and cognate expressions means to own land as *owner* or to possess or enjoy and as possessory mortgagee or as tenant or as intermediary or in one or more of those capacities.

5. Section 3 (14) defines a family thus :

"family" in relation to a person means the person, the wife or husband, as the case may be, of such person and his or her..

(*i*) minor sons and unmarried daughters and,

(*ii*) minor grandsons and unmarried granddaughters in the male line, whose father and mother are dead.

Explanation I—For the purpose of this clanse in the case of persons governed by Hindu Law, "minor sons" and "minor grandsons" shall not include sons or grand-sons.

(*i*) between whom and the other members of the family, a partition by means of a registered instrument has taken place; or

(*ii*) in respect of whose family properties a preliminary decree for partition has been passed before the notified date ;

Explanation II—For the purpose of this clause ......

(*a*) in the case of persons governed by Hindu Law, "unmarried daughters" and "unmarried grand-daughters" shall not include "unmarried daughters" or "unmarried grand-daughters"..

(i) in whose favour any land had been voluntarily transferred by either of whose parents or grand-parents on account of natural love and affection; or

(ii) in whose favour a preliminary decree for partition has been passed before the notified date;

(b) in the case of persons governed by any law other than Hindu Law "minor sons" "unmarried daughters", "minor grand-sons", and "unmarried grand-daughters", shall not include "minor sons", "unmarried daughters", "minorgrand-sons" and "unmarried grand-daughters "........

(i) in whose favour any land has been voluntarily transfered by either of whose parents of grand parents on account of natural love and affection ; or

(ii) in whose favour a preliminary decree for partition has been passed before the notified date."

A "person" for purposes of the Act is defined by section 3 (34) as under:

"Person" includes any company, family, firm, society or association of individuals, whether incorporated or not ; or any private trust or public trust ;

Section 5 (1) (a) of the Act states that the ceiling area in the case of every person and every family consisting of not more than five members shall be 25 standard acres. Under section 7 of the Act, it is provided that on and from the date of commencement of this Act, no person, shall, except as otherwise provided in this Act, but subject to the provisions of Chapter VIII, be entitled to hold land in excess of the ceiling area. There is no dispute in the present case that what is held by the petitioner is "land" as defined in section 3 (22) of the Act. It is also not in dispute that the petitioner is entitled or to enjoy the properties in question for her lifetime, though without powers of alienation and that the first respondent is a remainderman. Undoubtedly, therefore, the petitioner will be within the definition of a *"limited owner"* under section 3 (28) of the Act. Since under section 3 (33) (b) (1), *"owner"* includes a *"limited owner"* as well, section 3 (19) of the Act would apply and take in within its scope cases of persons holding land as a limited owner like the petitioner, with a right to enjoy the land for her lifetime and subject them to the provisions of the Act. The fixation of a ceiling under section 5 of the Act also points out that except as otherwise provided in the Act, no person shall be entitled to hold lands in excess of the ceiling area. It may also be mentioned that there is no provision in the Act as such to permit a person (a limited owner as in this case) to hold lands in excess of the ceiling area on the ground that another person has interest therein as remainderman. The contention of the learned counsel for the first respondent is that by reason of section 5 (6) of the Act, the lands in which a person has rights as limited owner as defined under section 3(28) are totally outside the purview of the Act. At first blush, it may appear that this argument is attractive and acceptable, yet, on a closer scrutiny, it is at once obvious that there is no merit in it. If the Act recognises a person in the position of the petitioner as a person "holding lands" as "owner" then, as stated already, there is no provision in the Act which exempts either such persons or the holdings by such persons or the interest of the remainderman from the operation of the provisions of the Act. But, on the other hand there are several provisions in the Act which indicate that even lands held by persons like the petitioner are also as much subject to the provisions of the Act as any other land. In the instant case, though at the stage of the computation of the ceiling in the hands of the petitioner, ostensibly the Act does not purport to affect the interest of persons who are remaindermen yet the scope of the Act and the provisions thereof are such that in the process of the application of the provisions of the Act to lands owned by a "limited owner" and subjecting him or her to a ceiling, the Act contemplates the interests of such remaindermen as well falling within the ambit of the Act. It must be borne in mind that what is proceeded against under the provisions of the Act is "land" as such in the hands of "limited or a full owner" as defined in the Act as the case may be and not merely against the interest of such person in the land. Under section 8 of the Act, any person holding lands in excess of the ceiling area is enjoined to furnish a return containing details of the holding, the particulars of the land which such person desires to retain within the ceiling area as well as that which he desires to be declared as surplus etc. On a consideration of the returns so filed under section 8 and such other information as may be collected under section 9, under section 10 the Authorised Officer is empowered to hold an enquiry and to prepare a draft statement in respect of each person holding or deemed to have held land in excess of the ceiling area. Sections 10 (1) (*viii*), 10 (1) (*x*) and 10 (1) (*xii*) are important. Section 10 (1) (*viii*) states

that the draft statement should contain the particulars of the land desired to be retained within the ceiling area, while sections 10 (1) (*x*) and 10 (1) (*xii*) state that the draft statement should also include the particulars of the land which may be comprised within the ceiling area and particulars of lands proposed to be declared as surplus. Section 10 (3) provides that if a person had failed to specify the particulars of the land which he desires to retain within his ceiling area, the Authorised Officer shall, as far as practicable, specify in the draft statement, the land which is capable of easy and convenient enjoyment as the land to be retained by such a person within his ceiling area. Section 10 (4) further provides that if the particulars of the land which a person desires to retain within his ceiling area have been specified, the Authorised Officer shall, as far as practicable, declare the same as the land comprised within his ceiling area. These provisions also indicate that the choice of either retention or surrender of surplus lands rests entirely with the person against whom proceedings under the Act are taken without reference to the interest of any other person in those lands. Statutorily, therefore, the person who is proceeded against under the provisions of the Act is the person who is given the choice to specify the land to be retained as well as the land to be surrendered. In this, the provisions of the Act, as they now stand, do not permit the remainderman to object to the retention or surrender of a particular item. This again further indicates that irrespective of the nature of the interest of the remainderman in the properties held by a limited owner to whom the provisions of the Act are applied, such limited owner can even surrender properties in which the remainderman has an interest. This position is further strengthened by section 52 of the Act. That section relates to the compensation payable in respect of the lands acquired by the application of the provisions of the Act to a "limited owner". Thereunder, the compensation payable in respect of the surplus lands held by a "limited owner" should be kept in deposit before such authority as may be prescribed and the interest accruing thereon has to be paid over to those persons entitled to the possession of the land. The first proviso to section 52 further contemplates a case where an encumbrance has been created over the interest of a limited owner and provides for the apportionment as well of the interest to the encumbrancer as well as the limitedowner. In such cases, the interest earned by the investment of the compensation shall be paid to the encumbrancer to the extent to which the encumbrancer is entitled and the balance is payable to the person or persons who would, for the time being, have been entitled to the possession of the said land. Section 52 (2) further brings out very clearly that persons with interest in lands similar to that of the petitioner in the instant case are also subject to the Act, as otherwise the provisions for payment of interest and the time during which the compensation should remain in deposit will be wholly out of place. Apart therefore from the definitions and provisions in the Act referred to already, section 52 is a clear pointer to the intention of the legislature that lands, as in the present case, can also be subjected to the law of ceiling in respect of which compensation is deposited and the interest alone is made available to the person who is entitled to remain in possession, but for the deprivation of such possession by the application of ceiling law. In other words, the limited owner is compensated by payment of interest for deprivation of possession by the application of the Act, while the remainderman is given the benefit of compensation deposited, when the estate falls into possession or he becomes entitled to the same and such compensation obviously is in lieu of the land in which he has an interest as reminderman and which is lost to him by the application, of the provisions of the Act to a person who falls within the definition of a limited owner as defined in section 3 (38) of the Act. As seen above, the provisions of the Act do trench upon the interest of the remainderman. In the light of the other provisions of the Act referred to earlier, it cannot be claimed that such interest cannot be touched by the provisions of the Act or in other words the interest of the remainderman is wholly outside the scope of the Act. The extreme contention of the learned counsel for the first respondent that under section 5 (6) of the Act a remainderman is totally outside thescope of the Act cannot be accepted. Unless there is an exemption of such interest from the purview of the provisions of the Act, it cannot be assumed that in process of applying the provisions of the Act to lands in the holding of the "limited owner" under the Act, the interest of the remainderman should be left untouched. As stated already, the Act deals with and imposes a ceiling on land without reference to the subordinate or lesser interest therein created

in favour of different persons. If, lands in which another person has interest as a remainderman, can for purposes of the Act, be treated as land comprised in the holding of a limited owner we do not see how such land can cease to be land for purposes of surrender. The effect of section 5 (6) is that in computing the extent of land owned by any person, that extent which may revert to such person immediately after the death of any limited owner, be excluded. It means no more than that in considering whether the remainderman would be subject to the provisions of the Act, the extent of the lands in which he has interest as a remainderman need not be taken into account during the lifetime of the limited owner. It must also be remembered that a remainderman is neither a full owner nor even a limited owner as defined in the Act and he does not also claim through a "limited owner". Till the actual determination of the interest of the "limited owner" and the falling into possession of the remainder, the holder of such an interest does not become a full owner of the lands. The reason behind a provision like section 5 (6) is at once apparent. Inasmuch as the lands in a holding in excess of the ceiling in which another person has interest as a remainderman can be subjected to the provisions of the Act even in the hands of a person who does not answer the description of a "full owner", such lands need not be included or taken into account in computing the holding, if any, of the remainderman, during the lifetime of the limited owner. After the application of the provisions of the Act to the limited owner and the declaration of a surplus, the lands in the permitted holding of the limited owner in which the remainderman may have an interest, will again, after the termination of the life interest, along with the other lands, if any, of the remainderman, be subjected to the ceiling law. It is therefore quite conceivable that the "limited owner" in the first instance and later the remainderman as "full owner" may be subject to the provisions of the Ceiling Act; but that is no ground to say that the "limited owner" or remainderman as such, are totally outside the Act. In our view, section 5 (6) cannot be construed in such a manner as to result in such a wholesale exclusion as there are clear provisions in the Act that the interest of the limited owner and the remainderman in the land would be subjected to the Act. In the absence of any specific statutory provision, it cannot be a matter of assumption that the interest of a remainderman would not be within the scope of the ceiling Act. The consideration that the remainderman is likely to be deprived of the property *in specie* on the application of the provisions of the Act to a holding in the hands of a limited owner and that he may be entitled only to a monetary compensation in lieu thereof cannot be a ground to hold that the remainderman has got rights in the property taking advantage of which he can object to the surrender by the limited owner of lands in which he has a vested remainder. The payment of compensation to the remainderman on the termination of the interest of the limited owner may be poor consolation so far as his interests are concerned as his claim to the land as such is not given effect to, but that is the result of the operation of the provisions of the statute. We are therefore clearly of the opinion that as per the provisions of the Act as they are, the interest of a remainderman can, by the application of the provisions of the Act to a limited owner, be interfered with, though the remainderman by himself or herself may not be the person to whom the provisions of the Act are applied. In order to exclude the two items of properties in which the first respondent claims interest as a remainderman from the lands to be surrendered, the Land Tribunal had relied upon the decision in *Krishnaswami Mudaliar* v. *The Authorised Officer (Madras Land Reforms), Cuddalore*[1]. In that case, the petitioner prayed before the Authorised Officer (Land Reforms), Cuddalore that the land which he purchased from one Papayee Ammal may be included within the ceiling area of the said Papayee Ammal. The land had been purchased by the petitioner on 21st November, 1962 long after the notified date *viz.*, 2nd October, 1962. The plea of the petitioner to include the extent so purchased by him from Papayee Ammal was not accepted by the Authorised Officer as the sale in favour of the petitioner was after the notified date and that such a transaction cannot be recognised. Therefore, the request of the petitioner to include that extent within the ceiling area of Papayee Ammal was not accepted. In dealing with the question whether a person who had purchased the property even after the notified date will have an interest in the land and as such, entitled to notice under section 10 (5), Kailasam, J. (as he then was) held that the

1. (1973) 2 M.L.J. 25: 86 L. W. 206: A.I.R. 1973 Mad. 453.

intention of section 10 (5) is to hear the objections and to pass orders after considering their interests and in that view, the Authorised Officer would be well within his powers, if he allots the land that had been assigned to a third party after the notified date for valuable consideration within the ceiling area of the person submitting the return. The question in the present case is very different from that case. We are not concerned with any alienation after the notified date and any attempt by the vendor or the purchaser to retain the extent of land sold within the ceiling of the vendor. It is not the complaint of the first respondent that he did not have notice of the proceedings. Indeed, he has had more than an ample and adequate opportunity to agitate his claim that the two items of properties should not be included in the lands offered by the petitioner for being surrendered to the Government as surplus. The objection that has been raised and persisted in by the first respondent to the effect that the two items of properties in which he has an interest as remainderman should not be included in the surplus lands of the petitioner at all, as pointed out already, cannot be accepted, particularly in view of the provisions of the Act already referred to. Under these circumstances, we are of the view that the reliance by the Land Tribunal on the decision of Kailasam, J., as he then was, referred to earlier, cannot in any manner advance of the case of the first respondent. We may also point out that section 10 (4-A) of the Act now specifically provides for the inclusion of the property transferred within the ceiling area of the transferor or the person effecting the partition as the case may be, as if no transfer or partition had taken place. This provision has been made only with a view to safeguard the interest of the alienees like the petitioner in the decision of Kailasam, J., as he then was, referred to above. But as has been pointed out already, the position in the present case is very different. For the aforesaid reasons, the order of the Land Tribunal has to be set aside and that of the Authorised Officer restored. Consequently, the civil revision petition will stand allowed. No costs.

R.S. — *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

A. Gulam Mohamed .. *Appellant**

v.

A. K. M. Pichai Maracair .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 10 (2) (vi)—Petition for eviction by landlord — Allegation that tenant ceased to occupy the building for a continuous period of more than four months — "Ceasing to occupy" — Meaning of.

The two requirements to be fulfilled before an order for eviction can be obtained by a landlord under section 10 (2) (*vi*) of the Tamil Nadu Buildings (Lease and Rent Control) Act are: (1) the landlord must establish that the tenant has ceased to occupy the building for a continuous period of four months and (2) that there was no reasonable cause for the same. The word "occupy" means "to take possession of" or "to hold and have in possession". It was not in dispute in the present case that the respondent was keeping the articles required in connection with his business inside the premises in question. Whether this would amount to occupation of the building or not has to be considered in the light of the surrounding circumstances and the intention of the parties. The evidence in this case clearly and categorically discloses that the respondent was in effective occupation of the premises in question by not only keeping the articles required in connection with his business there, but also carrying on, though not regularly, his buisness through his agents and that would suffice to hold that the tenant was still in occupation of the building. [*Para.* 4.]

Cases referred to:—

Amar Singh v. *Ram Rakha*, A.I.R. 1972 P. & H. 383; *Abdul Rahim & Bros.* v. *Selvan Bros.*, (1956) 1 M.L.J. 237; *Smt. Shakuntala Bawa* v. *Ram Parshad*, (1963) 65 P.L.R. 103; *Baij Nath* v. *Badhawa Singh*, (1956) 58 P.L.R. 236; *Firm Ram Kishan Shah Etwari Sahu* v. *Jamuna Prasad*,

*C.R.P. No. 775 of 1979. *14th August*, 1980.

A.I.R. 1951 Pat. 469; *Rex* v. *St. Pancras*, (1877) 2 Q. B. D. 581; *Kumti Lal* v. *Nanak Chand*, (1967) 69 P.L.R. 799.

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act XXIII of 1960 as amended by Act XXXIII of 1973 praying the High Court to revise the order of the Principal Subordinate Judge, Tirunelveli, dated 20th September, 1978 and made in C.M.A. No. 74/77, (H.R.C.O.P. No. 140/75) Principal District Munsif (Rent Controller, Tirunelveli).

K. Alagiriswamy, for Petitioner.

V. Narayanaswamy, for Respondent.

The Court made the following

ORDER.--The landlord, who had lost his application for an order of eviction against the respondent herein under section 10(2) (*vi*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, XVIII of 1960 as amended by Act XXIII of 1973 (hereinafter referred to as the Act) before the Authorities below is the petitioner in this civil revision petition. The petitioner is the owner of non-residential premises bearing door No. 27, Madurai Road, Tirunelveli Junction. The respondent is a tenant in occupation of this premises on a monthly rent of Rs. 90 payable according to the English Calendar on or before the 5th of every succeeding month. The petitioner stated that the respondent is not conducting any business in the premises in question and that from February, 1975 onwards the respondent had ceased to occupy the building for a continuous period of more than four months without any reasonable cause and has thus rendered himself liable to be evicted. In addition, the petitioner also stated that the respondent had committed wilful default in the payment of rent and that the rents had remained unpaid from March, 1975 onwards. A notice was sent by the petitioner to the respondent on 2nd July, 1975, terminating the tenancy and demanding vacant possession of the premises to which the respondent sent a reply stating that he continues to be in occupation of the premises and that there is no arrears of rent. Since the respondent did not vacate the premises, the petitioner filed H.R.C.O.P. No. 140 of 1975 before the Rent Controller (Principal District Munsif), Tirunelveli, under section 10 (2) (*vi*) of the Act praying for an order of eviction against the respondent.

2. The respondent herein resisted that application contending that the respondent has been running the business as usual in the premises and that even at the time when the premises was taken by the respondent, the petitioner was made aware that the business in the premises will be run by the agents and relations of the respondent and that the business is now being conducted by the agents of the respondent. The further case of the respondent was that owing to some misunderstandings between him and his former agent, the business is run by another manager newly appointed and the petitioner had filed the application for eviction at the instigation of the former agent of the respondent. The respondent reiterated his occupation of the premises as a tenant and further stated that his business stocks, equipments, furniture, etc. are all kept in the premises and the manager is running the business. The rents, according to the respondent, were regularly remitted and received by the petitioner and the delay in the payment was owing to the tour of the respondent and, therefore, there is no question of any wilful default as claimed by the petitioner. On these grounds, the respondent prayed for the dismissal of the application.

3. The learned Rent Controller (Principal District Munsif), Tirunelveli, who enquired into this application, held that the petitioner has not succeeded in establishing that the respondent has ceased to occupy the building in question and, therefore, the petitioner is not entitled to an order for eviction against the respondent under section 10 (2) (*vi*) of the Act. The other ground upon which the eviction was sought, namely, wilful default in the payment of rents was not persisted in because the respondent had paid all the rents in an application under section 11 of the Act filed by the petitioner herein which was also duly endorsed by the counsel for the petitioner. On the conclusion so arrived at, the Rent Controller dismissed the application. Aggrieved by that, the petitioner preferred an appeal in C.M.A. No. 74 of 1977 to the Appellate Authority (Principal Subordinate Judge), Tirunelveli. The Appellate Authority also concurred with the conclusion of the Rent Controller and held that the petitioner has not established that the respondent has unreasonably ceased to occupy the building for a continuous period of four months and upheld the order of the Rent Controller

and dismissed the appeal. It is the correctness of this order that is challengd in this civil revision petition.

4. The learned counsel for the petitioner would contend that the respondent had ceased to occupy the building for a continuous period of four months without reasonable cause and the mere circumstance that certain articles like the furniture, barrels, almirahs, etc., have been left behind by the respondent in the premises cannot amount to "occupation of the premises" by the respondent and, therefore, the building not having been admittedly occupied by the respondent herein for more than four months without any reasonable cause, the petitioner is entitled to an order for eviction. In this connection, the learned counsel for the petitioner also places strong reliance upon the decision in *Amar Singh* v. *Ram Rakhal*[1]. On the other hand, the learned counssel for the respondent contends that occupation does not mean physical occupation as such, but that keeping the furniture and other articlesin the premises for the carrying on of the business would be sufficient occupation within the maning of section 10 (2)(*vi*) of the Act. Reliance in this connection is placed on the decision in *Addul Rahim & Bros.* v. *Selvan Bros.*[2]. Before proceeding to consider these contentions, it is necessary to notice the relevant statutory provision. Section 10 (2) (*vi*) of the Act provides that a landlord can apply to the Controller for an order of eviction against the tenant in a case where the building is situate in a place other than a hill-station, if the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause. In the present case, the premises is not situate in a hill-station and, therefore, the petitioner can invoke the aforesaid provision, if the other conditions of the section are satisfied. The two requirements to be fulfilled before an order for eviction can be obtained by a landlord under section 10 (2) (*vi*) of the Act are: (1) the landlord must establish that the tenant has ceased to occupy the building for a continuous period of four months; and (2) that there was no reasonable cause for the same. The first question that arises for consideration is, whether the respondent has "ceased to occupy the building". The word "occupy" means "to take possession of", or "to hold and have in possession". It is not in dispute in the present case that the respondent is keeping the articles required in connection with his business inside the premises in question and even the evidence of the petitioner examined as P.W. 1 supports this. Whether this would amount to occupation of the building or not has to be considered in the light of the surrounding circumstances and the intention of the parties. The evidence of the respondent examined as R. W. 1 is to the effect that it is not as if he has abandoned the premises in his occupation as a place of business, but that the business is being carried on, though not continuously, through his agents as well. It is thus obvious that the intention of the respondent is not to give up or to end or terminate his possession of the premises, but that on the other hand, he has exhibited an intention to continue to keep the premises in his possession as before by keeping the articles and also by placing the business under the control of somebody else. From the above, it is clear that though for the time being the respondent is at Madras living with his family members, yet, he has not in any manner either abandoned or even manifested any idea of abandonment of the premises in his occupation as tenant. Therefore, the circumstance that the respondent still retains possession of the premises under his occupation by keeping his articles therein and locking it and also allowing his agents and others to carry on the business in the premises in question would indicate that the respondent has not ceased to occupy the premises. The evidence of P. W. 1 who has been living at Kovilpatti is not very helpful to establish the cessation of the occupation of the premises by the respondent as he could not have known anything about the same. The evidence of the other witness examined on behalf of the petitioner P.W. 2 was not accepted by the Rent Contrcller on the ground that he was a witness who was called upon to give evidence on the assurance by the petitioner that he will be compensated for the wages and food for the day. The only other circumstance pressed into service by the learned counsel for the petitioner is that Exhibit A-1 the Meter Card in respect of the premises indicates that the door of the premises had been locked for the period between 18th March, 1975 and August, 1975. Though at first sight this may

1. A.I.R. 1972 Punj & Har. 383.
2. (1956) 1 M.L.J. 237.

indicate that the premises in question had been kept closed between 18th March, 1975 and August, 1975, yet, it is not improbable that the premises had remained locked only on those days on which the meter-reader visited the premises and, therefore, it is not possible from Exhibit A-1 to infer that the premises had been kept locked by the respondent for a continuous period of four months. The learned counsel for the petitioner would very strongly rely upon the decision in *Amar Singh* v. *Ram Rakha*[1] and contend that "occupation" contemplated by the section would be actual user of the building and the mere presence of furniture did not amount to occupation. On a perusal of the decision, it is found that section 13 (2) (*v*) of the East Punjab Urban Rent Restriction Act is couched in more or less the same terms as the Act in force in Tamil Nadu and the expression used therein is also "has ceased to occupy the building for a continuous period of four months without reasonable cause." The learned Judge felt bound to apply the decision in *Smt. Shakuntala Bawa* v. *Ram Parshad*[2], where Falshaw, CJ., had an occasion to deal with this question and observed thus:

"Where for all practical purposes the tenant had ceased to reside in the house in dispute which was situate in Hissar and had gone to reside at Delhi, only visiting Hissar very occasionally for short periods and even then not using the house in the sense of sleeping there, the mere presence of the furniture and willingness to pay rent does not constitute occupation within the meaning of section 13 (2) (*v*) of the East Punjab Urban Rent Restriction Act. The word 'occupation' means occupation in the sense of actual user."

An earlier decision is *Baij Nath* v. *Badhawa Singh*[3], where the following observations of Ramaswami, J., in *Firm Ram Kishun Shah Etwari Sahu* v. *Jamuna Prasad*[4], had been referred to:

"As observed in *Rex* v. *St. Pancras*[5] :—

Occupation includes possession as its primary element but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of vacant house is in possession and may mainta in trespass against anyone who invades it; but as long as he leaves it vacant he is not in occupation; nor is he an occupier."

1. A.I.R. 1972 Punj. & Har. 383.
2. (1963) 65 Punj. L.R. 103.
3. (1956) 58 Punj. L.R. 236.
4. A.I.R. 1951 Pat. 469.
5. (1877) 2 Q.B.D. 581 at 588.

Again in *Kimti Lal* v. *Nanak Chand*[1], the word "occupation" in section 13 (2) (*v*) of the East Punjab Rent Restriction Act has been held to be actual user of the building and the mere presence of furniture did not amount to occupation. It will thus be seen that consistently the Courts in Punjab have taken the view that occupation in section 13 (2) (*v*) of the East Punjab Urban Rent Restriction Act means the actual user of the building. However, it is seen that the basis for this conclusion proceeds on the observations referred to above in *Rex* v. *St. Pancras*[2]. It has been pointed out there that if the owner of a vacant house leaves it vacant, he is not in occupation. But in the present case, on the evidence it has already been found that the premises has not been left vacant by the respondent, but the articles of business have been kept and the business, according to the evidence of R.W. 1 is also being carried on by his agents. These considerations would suffice to include the present case within the scope of the decision in *Amar Singh* v. *Ram Rakha*[3]. On the other hand, the position in so far as this Court is concerned has been well-settled since 1956 and it had remained unshaken as well. Rajagopala Ayyangar, J., in *Abdul Rahim and Brothers* v. *Selvan Brothers*[4], held that there is no requirement in the Act that the tenant should actually carry out business in order to prevent his eviction, but that it would suffice if he occupies it and keeping the furniture in the premises is sufficient occupation within the meaning of section 7 (2) (*v*) of the Tamil Nadu Buildings (Lease and Rent Control) Act XXV of 1949 comparable to section 10 (2) (*vi*) of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973. The learned counsel for the petitioner, however, would attempt to distinguish that decision by contending that in that case the premises was taken on lease for the purpose of carrying on business in wine and consequent to the intro-

1. (1967) 69 Punj. L.R. 799.
2. (1877) 2 Q.B.D. 581 at 588.
3. A.I.R. 1972 Punj & Har. 383.
4. (1956) 1 M.L.J. 237.

duction of prohibition, such a business became illegal with the result that the tenant was unable to carry on his business but kept the furniture and paid the rents. It must be pointed out that it is not with reference to the nature of the business that the words "ceased to occupy the building" has to be interpreted but on other relevant considerations adverted to above. The attempted distinction by the learned counsel for the petitioner cannot, therefore, be accepted. The evidence in the instant case clearly and categorically discloses that the respondent is in effective occupation of the premises in question by not only keeping the articles required in connection with his business there, but also carrying on, though not regularly, his business through his agents and that would suffice to hold that the tenant is still in occupation of the building. Under these circumstances, the orders of the Courts below are perfectly correct and do not merit any interference in revision. The result is, the civil revision petition fails and is dismissed. No costs.

R.S. ———— *Civil revision petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, CJ. and V. Ratnam, J.*

Muthaiah Chettiar .. *Appellant**

v.

Krishnaswami Gounder (died) and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 47 *and Order* 21, *rule* 95—*Limitation Act* (*XXXVI of* 1963), *Article* 134 — *Execution* — *Sale of immovable property* — *Purchaser wanting to take delivery*— *Obstruction by defendants* — *Purchaser's remedy is to file application for delivery of possession*— *Article* 134 *of Limitation Act applies to the application.*

Held: There is no warrant for holding that Article 134, of the Limitation Act will apply only when an application for delivery of possession is filed under Order 21, rule 95 of the Code of Civil Procedure and will not apply when the application for delivery of possession is made under section 47 of the Code. Nor is there any warrant in principle or authority that to an application for delivery of possession under Order 21, rule 95 of the Code of Civil Procedure. Article 134 of the Limitation Act will be attracted whereas when the application is purported to be made under section 47 of the Code, Article 137 will be attracted. [*Para.* 3.]

Article 134 alone will apply to an application filed by an auction-purchaser of immovable property at a sale in execution of a decree for delivery of possession of the property purchased by him. [*Para.* 2.]

Case referred to:—

Haranadrai Badridas v. *Dabicutt Bhagwati Prasad*, (1974) 2 S.C.J. 196: (1973) 2 S.C.C. 467: (1973) 1 S.C.W.R. 912: A.I.R. 1973 S.C. 2423.

Appeal under Clause 15 of the Letters Patent against the decree and judgment dated 22nd August, 1975 of Mr. Justice Mohan and passed in S. A. No. 1561 of 1971 (A.S. No. 445 of 1970, District Judge, Coimbatore East, at Erode O. S. No. 439 of 1967, Principal District Munsif, Erode).

R. Krishnamurthi, D. Raju and *A.R. Lakshmanan,* for Appellant.

* L.P.A. No. 19 of 1976. *14th February,* 1980.

S. Thiagaraja Ayyar, for Respondents.

The Judgment of the Court was delivered by

Ismail, CJ.— This is an appeal against the judgment and decree of Mohan, J., dated 22nd August, 1975 made in Second Appeal No. 1561 of 1971. The suit property originally belonged to the deceased first respondent and respondents 2 and 3 herein. O. S. No. 44 of 1958 was filed by one Kuppanna Gounder against Chinnaswami Gounder, the first defendant in the present suit, on the foot of a promissory note and that suit was decreed. Pending suit, the plaintiff in O. S. No. 44 of 1958, namely, Kuppanna Gounder died, and his legal representatives, namely, his son and widow were added as plaintiffs 2 and 3. In execution of the decree in E.P.R. No. 184 of 1963 the property was brought to sale in Court-auction and was purchased by the appellant herein for a sum of Rs. 6,005 on 6th February, 1964. The sale was confirmed on 5th April, 1965. When the appellant wanted to recover possession, that was obstructed by defendants 2 and 3 in the suit. Hence, the appellant filed O. S. No. 439 of 1967 on the file of the Court of the District Munsif, Erode, for delivery of possession and also for recovering past and future mesne profits. The defence put forward by the defendants was that the remedy of the auction-purchaser was only to file an application under Order 21, rule 95 of the Code of Civil Procedure for delivery of possession of the suit property and such remedy had become barred, since the appellant did not file such an application within one year from the date of the confirmation of the sale, and the suit as such was not maintainable in view of the bar under section 47 of the Code of Civil Procedure. The learned District Munsif while holding that the appellant had acquired title to the property by virtue of the sale certificate, namely, Exhibit A.1 dated 5th April, 1965, held that section 47 of the Code of Civil Procedure was not a bar to the maintainability of the suit and, therefore, decreed the suit with past mesne profits. With regard to the future mesne profits, the learned District Munsif directed the same to be decided in separate proceedings. The respondents herein filed A. S. No. 445 of 1970 on the file of the District Judge, Coimbatore East at Erode, and that appeal failed. It is thereafter the respondent preferred the second appeal before this Court Mohan, J., in the judgment under appeal held that the suit was barred under the provisions of section 47 of the Code of Civil Procedure. However, he considered the submission made on behalf of the appellant herein that the Court has the power to convert the suit into an application under section 47 and dispose of the matter. The learned Judge was willing to convert the suit into an application, but held that even as an application, the same was barred by limitation. According to the learned Judge, it is Article 134 of the Schedule to the Limitation Act 1963, that applies and as per that Article the period of limitation was one year from the date of the confirmation of the sale and in the present case the confirmation was effected on 5th April, 1965 and the suit was filed on 21st March, 1967 beyond the period of one year and consequently even treating the suit as an application under section 47 of the Code of Civil Procedure, the application was barred by limitation, with the result, the learned Judge allowed the second appeal and set aside the judgments and decrees granted by the Courts below in O.S. No. 439 of 1967 and in A.S. No. 445 of 1970. However, the learned Judge granted leave to appeal, and hence the present appeal comes up for disposal.

2. Having regard to the decision of the Supreme Court in *Harandrai Badridas* v. *Dabidutt Bhagwati Prasad and others*[1] the learned counsel for the appellant-plaintiff does not challenge the conclusion of the learned Judge that a suit did not lie and only an application under section 47 of the Code of Civil Procedure, lay. In view of this, the only question that we have to consider is whether the conclusion of the learned Judge that even as an application under section 47, the proceedings initiated by the appellant herein were barred by limitation was correct or not. Before us, the learned counsel for the appellant contended that the Article that will apply to an application under section 47 is Article 137 of the Schedule to the Limitation Act, 1963 and not any other Article. In this context, it is relevant to consider three Articles in the Schedule to the Limitation Act, namely, Article 134, Article 136 and Article 137, and the said three Articles read as follows:

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1. (1974) 2 S.C.J. 196 : (1973) 2 S.C.C. 464: (1973) 1 S.C.W.R. 912: A.I.R. 1973 S.C. 2423.

Article	*Description of application*	*Period of limitation*	*Time from which period begins to runs.*
134.	For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year.	When the sale becomes absolute.
136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil Court.	Twelve years.	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpectual injunction shall not be subject to any period of limitation.
137.	Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues

Article 137 is a general and residuary Article and by its own terms will apply only to an application for which no period of limitation was provided elsewhere in the Third Division to the Schedule. Therefore, we have to find out whether there is any other Article that will apply to the application in question. The learned counsel for the appellant contended that the Article that applies to the present case is Article 136 if not Article 137. According to the learned counsel, the very decision of the Supreme Court referred to above holds that an application for delivery of possession of a property sold in execution of a decree will form part of the execution and, therefore, when the appellant applies for delivery of possession of the property, it was merely for execution of the decree and consequently Article 136 applies. A combined reading of Article 134 and Article 136 will clearly establish that even on the basis of the argument of the learned counsel for the appellant, Article 134 is a special provision, while Article 136 is a general provision. We are, for the purpose of considering this question, assuming that an application for delivery of possession of the property sold in execution of the decree can be treated as an application for execution of the decree. The learned counsel relied on the very judgment of the Supreme Court for putting forward the contention that an application for delivery of possession of the property sold in execution of the decree will also be an application for execution of the decree. We are not able to accept this argument, because the Supreme Court dealt with all the three expressions occurring in section 47 of the Code of Civil Procedure together, namely "execution", "discharge" and "satisfaction" and did not deal with the respective scope of the three expressions as between them. Whatever that may be, there can be no doubt even on the contention of the learned counsel for the appellant, Article 136 will constitute a general provision, while Article 134 will constitute a special provision, because, according to the learned counsel, an application for delivery of possession of the

property sold, is an application for execution of a decree. In other words, even on the contention of the learned counsel for the appellant that delivery of possession of the property will be comprised in the expression "execution of the decree", the inference is irresistible that Article 136 is a general provision, while Article 134 is a special provision. If so, there is no escape from holding that the special excludes the general and, therefore, Article 134 alone will apply to an application filed by a purchaser of immovable property at a sale in execution of a decree for delivery of possession of the property purchased by him.

3. The learned counsel for the appellant sought to contend that Article 134 will apply only when an application for delivery of possession is filed under Order 21, rule 95 of the Code of Civil Procedure, and will not apply when an application for delivery of possession is filed under section 47 of the Code. The learned counsel was not able to convince us with reference to any principle or authority that such a distinction is warranted having regard to the language of Article 134 of the Schedule to the Act. It is only on this basis, namely, when the application is filed under Order 21, rule 95, Article 134 will apply, and if the application is filed under section 47 of the Code of Civil Procedure, Article 134 will not apply, the learned counsel sought recourse to Article 137. As we have pointed out already, the learned counsel for the appellant had not been able to convince us with reference to any principle or authority that when an application for delivery of possession is purported to be made under Order 21, rule 95, Civil Procedure Code, it attracts Article 134 and when the same application is purported to be made under section 47 of the Code of Civil Procedure it attracts Article 137 and it is the provision of law under which it is purported to be made that makes all the difference. It is pertinent to point out that Article 134 itself does not refer to either section 47 or Order 21, rule 95 and is in general terms and this acquires significance in view of the fact that section 5 of the Limitation Act expressly refers to Order 21 of the Code of Civil Procedure, 1908, that section provides:

> "Any appeal or any application, other than an application under any of the provisions of Order 21, of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

If it was the intention of the Legislature to make a distinction between an application for delivery of possession of the property sold at a Court auction in excution of a decree filed under Order 21, rule 95 and an application filed under section 47, the Legislature would have expressly referred to the provisions of Order 21 in Article 134.

4. Having regard to the above features, we agree with the conclusion of the learned Judge and dismiss the appeal.

5. However, there is one matter which needs to be clarified. As against the decree passed by the learned District Munsif in O. S. No. 439 of 1967, the first defendant did not prefer an appeal, and the appeal was preferred only by defendants 2 and 3, in A S.No.445 of 1970 on the file of the Court of the District Judge of Coimbatore East at Erode, wherein he remained *ex parte*. In view of his remaining *ex parte* in the first appeal, notice to him was dispensed with in the second appeal. Under these circumstances, we are of the opinion that the decree passed by the learned Judge should be clarified by stating that the suit will stand dismissed only against defendants 2 and 3 and not against the first defendant.

6. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

M. Muthayya .. *Appellant**

v.

Kamu *alias* Kamala Ammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rules* 4 *and* 20—*Scope and applicability.*

Since the first and second defendants in the instant case had a common defence the provisions of Order 41, rule 4, Civil Procedure Code, would *prima facie* apply in support of the maintainability of the appeal.

Under the provisions of Order 41, rule 20, where it appeared to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal was preferred but who had not been made a party to the appeal was interested in the result of the appeal, the Court may adjourn the hearing to a future date to be fixed by the Court and direct that such person be made a respondent. Clause (2) of rule 20 of Order 41, provides that no respondent shall be added under this rule after the expiry of the period of limitation for appeal, unless the Court for reasons to be recorded, allows that to be done on such terms as it thinks fit. Clause (2) would apply only to a case where the party who is not impleaded, had acquired certain valuable rights by reason of an appeal as against him or her not having been filed. It is only in such cases clause (2) or rule 20, would have scope for application. But so far as clause (1) is concerned the Court may at any stage direct the respondent being impleaded. In this case, it is possible to exercise discretionary power vested under Order 41, rule 20 (1) so as to implead the first defendant also as a party respondent in the interests of justice.

[*Para.* 15.]

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*App. No. 163 of 1976, and Memorandum of Cross objections. 18*th March,* 1980.

Cases referred to:—

Kumaraswamy Gounder v. *D. R. Naniappa Gounder,* 1977 T.L.N.J. 487; *Kamala Devi* v. *Sheo Prasad,* A. I. R. 1966 Pat. 247; *Rahima Bivi* v. *Sirajunnissa Bi,* (1971) 2 M.L.J. 243; *Surat Singh* v. *Manohar Lal,* A.I.R. 1971 S.C. 240; *Bhaurao Shankar Lokhande* v. *The State of Maharashtra,* (1966) 1 An. W. R. (S. C.) 92: (1966) M.L.J. (Crl.) 226: (1966) 1 M.L.J. (S.C.) 92: (1966) 1 S.C.J. 298: (1965) 2 S.C.R. 837: A. I. R. 1965 S. C. 1564; *Raghvir Kumar* v. *Shanmughavadivu,* (1970) 2 M.L.J. 193: I.L.R. (1970) 1 Mad. 104: A.I.R. 1971 Mad. 30; *Sethurathnam Pillai* v. *Lucy Baskara Josephine,* (1977) 2 M.L.J. 141.

Appeal and Memorandum of Cross-Objections against the decree of the Court of I Additional Subordinate Judge, Tiruchirapalli in Original Suit No. 89 of 1972.

R. Gandhi, M. Kamalanathan and *G. Sivabalanathan,* for Appellant.

K. Sarvabhauman and *R. Nandakumar,* for Respondents.

The Judgment of the Court was delivered by

Sethuraman, J.—This appeal has been filed by the second defendant in O.S. No. 89 of 1975 in the Court of the Subordinate Judge of Triuchi. There was one T. M. Meenakshisundaram, who died on 28th June, 1967 in the Government Headquarters Hospital, Coimbatore, when he was working there as a Revenue Divisional Officer in Erode. The first plaintiff claimed that she was married to the said Meenakshisundaram as the second wife and that her two daughters plaintiffs 2 and 3 are the children born out of the said wedlock. The first defendant is the first wife of the said Meenakshisundaram and the second defendant is their son. It may be mentioned here that the second defendant is an advocate by profession practising in Tiruchirapalli.

2. The first defendant gave birth to the second defendant in or about 1941, and by about 1943, she became mentally and physically afflicted with the result that there could be no conjugal life between Meenakshisundaram and the first defendant. She went over to her parent's place in Dindigul thereafter.

3. Meenakshisundaram was serving as a Government employee in the Revenue Department in several places. According to the first plaintiff her marriage with Meenakshisundaram took place at Srirangam in accordance with Hindu rites and custom of the community on 30th May, 1948. There was said to have been a Parisam preceding this marriage on 27th May at Periakulam. The second plaintiff was born on 30th January, 1957 and the third plaintiff on 24th May, 1963 at Periakulam and Karaikkal respectively. When the third plaintiff was born, Meenakshisundaram was posted as the Administrator of Karaikkal and was functioning there.

4. On 24th September, 1956, Meenakshisundaram executed a registered maintenance deed in favour of the first defendant and in that document, it is stated that the marriage between the first plaintiff and him took place on 30th May, 1948. He got certain properties under the will of one Thayyammal. The plaint A Schedule properties were said to have been acquired by Meenakshisundaram out of his earnings and in item 5 of the A Schedule a house was built with his earnings. The B Schedule contains Bank deposits and National Saving Certificates, which are described as the exclusive assets of Meenakshisundaram. The C Schedule contains certain moveable items in which also the plaintiffs claim a share. According to the plaintiffs, they are entitled to 5|8th share in the properties described in the Schedules A to C.

5. They issued a notice prior to the filing of the suit on 11th July, 1970, demanding partition and rendition of accounts from the second defendant, who was in charge of the properties. The second defendant issued a reply on 15th July, 1970 denying the allegations about the marriage as false. The plaintiffs therefore, came forward with the suit for partition and allotment of 5|8th share in the plaint A to C Schedule properties and for accounting by the second defendant from 28th June, 1967 when Meenakshisundaram died.

6. The first defendant remained *ex parte*. Among defendants 3 to 23, only defendant 20 filed a written statement stating that he was a tenant in one of the suit properties and that he was willing to pay the rent to whomsoever the Court directed. According to him he was an unnecessary party to the suit and he was not liable for costs.

7. In the written statement filed by the second defendant, who is the main contestant of the suit, he denied that there was any marriage between the first defendant and Meenakshisundaram in 1948. He denied also the allegations that plaintiffs 2 and 3 were born on the dates mentioned in the plaint out of such lawful wedlock. He disclaimed any knowledge of the maintenance deed said to have been executed on 24th September, 1956 by Meenakshisundaram and even if there was a recital in the said deed to the effect that there was a marriage in 1948 with the first plaintiff, it was, in his submission, a false one. It was also stated that even assuming that there was a marriage, it could only have been in the year 1953 and that such a marriage would be a void one in view of the State enactment prohibiting bigamy among Hindus. According to him, he and his mother, the first defendant, were the only heirs and there was no question of any accounting in favour of the plaintiffs. He denied also that the B Schedule properties were with him or that the C Schedule properties belonged to Meenakshisundaram.

8. The learned Subordinate Judge framed the issues that arose out of the pleadings, and the main issue was whether the first plaintiff was a legally wedded wife of Meenakshisundaram.

9. After referring to the oral and documentary evidence, the learned trial Judge held that the first plaintiff was a legally wedded second wife of the deceased Meenakshisundaram and that the plaintiffs were entitled to 5|8th share in the properties left by Meenakshisundaram and described in Schedules A and B. He rejected the claims of the plaintiffs in relation the C Schedule properties, as it had not been made out that the said properties belonged to Meenakshisundaram. A preliminary decree was accordingly passed and the second defendant has filed the present appeal contesting the passing of the preliminary decree in favour of the plaintiff.

10. As soon as the appeal was opened, the learned counsel for the respondents submit-

ted that the first defendant had not been impleaded as a party in the appeal and that the non-impleading of the first defendant was fatal to the maintainability of the appeal. In the light of this preliminary objection, the appellant filed C.M.P. No. 2758 of 1980 for impleading the first defendant as the fourth respondent in the appeal. It was stated therein that the parties constituted a joint family, that the appeal was filed by the second defendant as the manager of the joint family, that the first defendant was *ex parte* in the lower Court and that as the appeal has been filed against the entire decree, it was considered unnecessary to implead the first defendant as a party. In order to avoid further litigation and in the interests of justice, it was stated that it was necessary to impleads her as the fourth respondent in the appeal and that the delay in doing so may be condoned. For the respondent, a counter-affidavit has been filed and it was stated that from the mere fact that the appeal had been filed against the entire decree, it did not follow that there was sufficient and satisfactory explanation for not impleading the first defendant as a party and that the appeal without impleading her is incompetent for non-joinder of necessary parties. The delay in filing this application was also adverted to and it was stated that every sharer in a partition suit should be impleaded and that the non-joinder of a necessary party to a proceeding was fatal to its maintainability and competency. Both sides referred us to certain authorities.

11. Order 41, rule 4, Civil Procedure Code, is the relevant provision, and it was relied on by Mr. Kesava Iyengar in support of his application. It states:

> "Where there are more plaintiffs or more defendants, than one in a suit, and the decree appealed from proceeds on any ground common to all, the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be".

In this case, the first and the second defendants had a common defence, and, therefore, the provisions of Order 41, rule 4 would *prima facie* apply in support of the maintainability of the appeal. A similar question came up for consideration before a Bench of this Court in *Kumaraswamy Gounder and others* v. *D. R. Naniappa Gounder and others*[1]. In that case the common ground which was agitated before the trial Court and the first appellate Court was whether certain alienations made by defendants 2 and 3 of some of the suit properties were sustainable at all. Some of the alienees, who were dissatisfied with the ultimate decision, came up in appeal raising the question whether the alienations were sustainable or not. This ground was common to all the defendants, and it was held that the fact that some of the defendants had appealed against the whole decree entitled the appellate Court to pass such judgment as the circumstances of the case would require in order to render justice to the party. It was also pointed out that the rules were based on justice, equity and good conscience and compelled the Court to treat the second appeal then under consideration as one filed for the benefit of all the alienees so that the appeal was considered to be competent and maintainable.

12. Mr. K. Sarvabhauman, learned counsel for the respondents relied on a decision of a single Judge of the Patna High Court in *Kamla Devi* v. *Sheo Prasad*[2]. Though when there is the Bench decision of this Court, which has dealt with an analogous situation, it would be unnecessary to consider this decision of a learned single Judge of a different High Court, still we may briefly consider it. In that case also the appeal was in a partition suit. The appeal had been dismissed as against the minor respondent on account of non-compliance with the peremptory order directing the appellant to serve notice of appeal on the minor-respondent within a week. There was a subsequent petition for restoration of the suit which failed and the Letters Patent Appeal against the dismissal of restoration petition was also dismissed. It was held that the whole appeal had failed for non-joinder of the minor-res-

1. (1977) T.L.N.J. 487.
2. A.I.R. 1966 Pat. 247.

pondent who was a necessary party. It may be seen from the narration of the facts that there was an earlier order which had dismissed the appeal. It was pointed out at page 248 of the reports that if the appellant was then allowed to add the proposed respondent the result would be that the order in the miscellaneous judicial case as well as in the Letters Patent appeal would become nugatory and the entire proceedings would constitute mere waste of time, and that valuable rights had been acquired by the respondents and that they could not be divested of those rights by the plaintiff-appellant being allowed now to add the respondent at that stage. The position is not analogous to the situation here. No right has been acquired here by any one, by reason of the non-impleading of the first defendant as a party. Therefore, this decision can have no scope for application.

13. The principle applicable to such situations has been considered in a decision of this Court in *Rahima Bivi* v. *Sirajunnissa Bi*[1]. In that case the plaintiff sold a property to the first defendant who in turn sold it to another and ultimately the sixth defendant became a vendee of the property. The plaintiffs sued for possession of the property and obtained a decree. But the appeal filed by the sixth defendant without impleading the first defendant was allowed and the suit was dismissed. In the second appeal, on the question whether the sixth defendant could get any relief, since she had not impleaded the first defendant in the first appeal, it was held that the first defendant had no interest in the property and that he got no relief by the decree in the trial Court and that the only person interested was the sixth defendant. Therefore, by the first defendant not being impleaded as a party, no interest of any person was affected and the failure to implead him did not bar the sixth defendant. The principle was stated to be that in cases where the party who had not been impleaded in the appeal had a substantial interest *in a portion* of the properties concerned in the suit, there could not be two contradictory decrees, one upholding the validity of the transfer in favour of the original transferee and another setting it aside. In such a case, it was held that a party who had succeeded in the trial Court but who had not been impleaded in the lower appellate Court could not be adversely affected by a decision against his interest in the appellate Court. It would be seen from this decision that if there are separate causes of action against different defendants or if the defences did not embrace the whole of the claim, the non-impleading of a necessary party would have some serious consequence in the maintainability of the appeal. Two conflicting decrees cannot hold the field. But in cases, where the defence is common, the non-impleading cannot have the same result, as there is no possibility of any conflicting decree being left in the field. If the second defendant succeeded the whole suit for partition would fail, and if he failed the plaintiffs were bound to succeed. There would thus be only one decree.

1. (1971) 2 M.L.J. 243.

14. Reference was also made by the respondent to a decision of the Supreme Court in *Surat Singh* v. *Manohar Lal*[1]. In that case the son of the plaintiff with other persons was brought on record on the death of the plaintiff during the pendency of appeal before the High Court. The son was represented by a counsel and the fact of his being impleaded was also within the knowledge of the other party. However when the other party filed the appeal before the Supreme Court, the son, who had been impleaded, was not a party to the appeal. It was held on these facts that the appeal was liable to be dismissed for want of necessary party. In that case also, an application was filed on the date of the decision to implead him as a party. But it was held that it was highly belated and could not be entertained. The said decision has absolutely no scope for application here, because this is a case where an appeal against the entire decree has been filed, and the non-impleading was due to the fact that the first defendant had remained *ex parte* in the Court below. As soon as it was pointed out or realised that she should also be made a party, steps were taken and, therefore, this is a case where it is possible to condone the delay also.

1. A.I.R. 1971 S.C. 240.

15. One other aspect that has to be remembered with reference to the above decisions is that these decisions were rendered at a time when the amended provisions of Order 41, rule 20, Civil Procedure Code, were not there. Under these provisions where it appeared to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal was preferred but who had not been made a party to the appeal was interested in the result of the appeal, the Court may adjourn the hearing to a future date to be fixed by the Court and direct that such person be made a respondent. Clause (2) of rule 20 of Order 41, Civil Procedure Code, provides that no respondent shall be added under this rule after the expiry of the period of limitation for appeal, unless the Court, for reasons to be recorded, allows that to be done, on such terms as it thinks fit. Clause (2) would apply only to a case where the party, who is not impleaded, had acquired certain valuable rights by reason of the appeal as against him or her not having been filed. It is only in such cases clause (2) of rule 20, would have scope for application. But as far as clause (1) is concerned the Court may at any stage direct the respondent being impleaded. In this case, it is possible to exercise the discretionary power vested under Order 41, rule 20 (1), Civil Procedure Code, so as to implead the first defendant also as a party respondent in the interests of justice. Having considered all the objections, we are satisfied that it is necessary to have the first defendant impleaded as the fourth respondent and C.M.P. No. 2758 of 1980 is ordered accordingly. The first defendant is represented before us by counsel, and she sails with the appellant.

16. The only substantial question that arises in this appeal is, whether there was a marriage between the first plaintiff and Meenakshisundaram at any time.

17. Exhibit A-16 is, as already stated, a maintenance deed. This document came into existence on 24th September, 1956, when Meenakshisundaram was the Tahsildar of Karur Taluk. It is stated therein that the first defendant's physical and mental capacity was not proper since 1943 and that he had contracted a second marriage with the first plaintiff in the year 1948. It is further stated therein that with a view to make provision for the maintenance of the first defendant, he provided that a sum of Rs. 25 P.M. should be paid to her as maintenance for the rest of her life time. This document has been attested by the mother of the first defendant. The Court below has proceeded as if the first defendant herself had attested this document. This impression is erroneous. It is significant to note that in Exhibit A-16, the date of the second marriage is not mentioned. As the earliest document coming into existence after the alleged second marriage, one would have expected Meenakshisundaram to have remembered the date of the marriage and to have mentioned it, as it is not far removed from 1948 when the said marriage is said to have taken place. The vague reference to the year 1948 is significant, because in Madras a statute was passed as the Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949). As the title itself shows, this Act prevented a second marriage between Hindus, perhaps, it was, considered necessary to select a date anterior to the coming into force of this Act, so that the validity of the second marriage would not be affected by it. The vague reference in Exhibit A-16 to the marriage between the first plaintiff and Meenakshisundaram in 1948 cannot, in these circumstances, be taken to establish as a fact the marriage in 1948. It does not even refer to the place where the second marriage is alleged to have place. Exhibit A-16 is thus of no avail to prove the second marriage.

18. In Exhibit A-8 which is a family pension nomination form and which is dated 19th March, 1965, Meenakshisundaram had described the first plaintiff as his wife and plaintiffs 2 and 3 as his daughters for purposes of nomination for family pension. Even in this form, there is absolutely no reference to the actual date on which such marriage took place. Exhibit A-8 does not establish the marriage with the plaintiff. Therefore, it is not possible to infer the factum of the second marriage, in any event, prior to the Madras Act (VI of 1949) from Exhibit A-8 either.

19. P.W. 2 is the first plaintiff's maternal uncle and P.W. 3 is her mother's sister. P.W. 2 merely states that the marriage

took place in the month of May, 1948 on a Sunday. He does not give any exact date as the marriage date. The marriage is said to have taken place between 5 A.M. and 6 A.M. on the said date and that an Iyengar officiated as the priest. There is also some description of the ceremony that was gone through. The place of marriage is referred to as Srirangam. If a marriage had taken place, it is too much to believe that the witness, such a close relation, did not remember it. He is also interested in the first plaintiff. P.W. 3 also does not give any exact date of the marriage though she also refers to the marriage having taken place in the early hours of a particular day. As seen earlier, she is also interested in the first plaintiff and therefore, her testimony cannot be taken as disinterested. Thus the oral evidence also is not helpful to the plaintiffs.

20. There are improbabilities about the marriage having been gone through in the year 1948. It is common that in that year the first plaintiff was employed as a teacher in Periakulam. Her father was working there. The first plaintiff did not inform about the marriage to the school authorities. This explains the reason why the plaintiff was driven to choose a Sunday. As P.W. 4 she stated that she did not even inform her colleagues about the marriage having taken place in that year and about the marital status. This is indeed surprising because there is no reason why this marriage should have been kept such a well-guarded secret. She did not join Meenakshisundaram till about September, 1953. Her explanation for continuing in the school between 1948 and 1953 is somewhat curious. During the training period she claims to have obtained a stipend of Rs. 200 and it was; according to her, not possible to repay that stipend out of the salary of Rs. 40 per month that she was getting from the school. Her father also with his salary could not repay Rs. 200. Apparently her case is that she continued to work in the school in order to see that if she worked for the required term, there was no need for the return of the stipend.

21. Exhibit B-1 dated 22nd June, 1947 is the application made to the school for appointment as teacher by the first plaintiff. In that application she stated that she was undergoing the emergency course in secondary grade training in Madurai and that she would appear for the training school leaving certificate examination in June, 1947. She hoped to come out successful. It is on that basis that she wanted to join the Edward Memorial Higher Elementary School, Periakulam, where she functioned between 1947 to 1953. It is clear from Exhibit B-1 that the school had nothing to do with her training and could not have insisted on her continuing in it for any length of time. If she had already undergone the training as is clear from Exhibit B-1, then there is no reason why the school could not relieve her on her marriage. There is absolutely no evidence to show that there was any obligation to return this stipend of Rs. 200 said to have been received by her. Further, her husband at the relevant time was well-placed in the revenue department in the District of Tiruchi. He must have been earning sufficiently so as to pay the stipend of Rs. 200, at least in adequate instalments, if it was indeed necessary to do so and get her out of the school. It is not suggested that he could not afford Rs. 200.

22. The case of the first plaintiff is that the second marriage became necessary because the first defendant was not in a position to give Meenakshisundaram the marital company. It was obviously considered necessary to go urgently through the form of marriage on 30th May, 1948 which happens to be a Kari Nal, an inauspicious day. If even on such an inauspicious day the marriage had to be performed because of the urgent need of Meenakshisundaram for a female companion, then one would have expected the first plaintiff to have joined him immediately thereafter. The fact that she did not join him for five long years is itself a piece of circumstantial evidence to show that the marriage could not have taken place in the year 1948. Her *"seemantham"* was in 1956, and the first child is born in 1957. These events are consistent with the marriage not having taken place in 1948. In the school records it is seen that she has described herself as 'Miss' showing that she was an unmarried woman. No one who was married would ordinarily have done so, and there was also no need to do so. It is true that certain other persons are also referred to as not having communicated their marital status to the

school. But those persons have not been examined so as to find out the circumstances under which they considered it necessary to keep their marriage a secret from the school which was their employer. Therefore, it is not possible to draw any inference in favour of the plaintiff, from the circumstances which remain unexplained, that some other persons had not also intimated the school authority about the marriage. It is also to be remembered that there is one Mrs. Arumugam who was a teacher working with the first plaintiff in the same school. Mrs. Arumugam is no other than the uncle's wife of Meenakshisundaram. If really a marriage had taken place in the year 1948, she was the best person who would have known about the marriage and could have spoken about it. The learned Subordinate Judge has proceeded as if the non-examination of this lady is of no consequence, as according to him there was criticism on the part of the defendants against the evidence of P.Ws. 3 and 4, who were also similarly related to first plaintiff. There would have been nothing standing in the way of the Court accepting the evidence of the said Mrs. Arumugam, if she was examined and found to be reliable. Even then, the Court may or may not accept the testimony of P.Ws. 3 and 4. The question of believing or disbelieving a witness would arise only after examination and a party cannot decline to produce a witness merely on the presumption that the witness, if produced, could be treated as interested.

23. It is also to be remembered that Meenakshisundaram had worked in several places like Musiri, Perambalur, Karur, Tiruchi etc., P.W. 4 herself admits that in 1951 Meenakshisundaram worked as Deputy Tahsildar, in Lalgudi, and as Taluk Supply Officer, in Thuraiyur; and in 1952 he was the Sub-Magistrate in Perambalur, and in 1953 he came to the Collectorate as Huzur Head Clerk, Tiruchi and also as the Election Deputy Tahsildar. She had not visited any of these places. It is indeed surprising that even during the vacation of the school, she had not visited Meenakshisundaram in any of these places. Thus, having regard to the above features, it is not possible to accept the claim of the first plaintiff that she married Meenakshisundaram in the year 1948.

24. The learned counsel for the appellant submitted by referring to two decisions that there could be no presumption as regards her marriage. In S.A. No. 592 of 1921 dated 18th January, 1924, the case being reported in short-notes at page 8 of 46, M. L. J.; Odgers, J., held that under section 112 of the Evidence Act the presumption of legitimacy arises only on proof of a marriage, and that if a marriage in fact is proved, then it might be presumed to be valid. He further held that where a man had already married a woman and had children by her, there was no presumption that another lady with whom he was said to have lived was his wife or his children by her were legitimate. There can thus be no presumption in a case like this.

25. In *Bhaurao Shankar Lokhande and another* v. *The State of Maharashtra and another*[1], there is a decision of the Supreme Court in which it is pointed out that the bare fact of a man and a woman living as husband and wife does not at any rate normally give them the status of husband and wife. This observation came to be made in a case involving the consideration of the question whether there was a valid second marriage which would be an offence under section 17 of the Hindu Marriage Act and section 484 of the Indian Penal Code. Their Lordships held that if there was not a valid marriage, then it would not be a marriage in the eye of law and therefore, there could be no offence. This decision is not really of any assistance to decide the point at issue. The question as to whether the persons living as husband and wife could be taken to have contracted a valid marriage has been considered by two decisions of this Court, one in *Raghvir Kumar* v. *Shanmughavadivu*[2], and the other in *Sethurathnam Pillai* v. *Lucy Raskara Josephine*[3]. In the first of these decisions, there was some evidence to show that some form of marriage had been gone through, and there was also long cohabitation. It was held that in such a case the presumption of a valid

1. (1966) 1 M.L.J. (S.C.) 92: (1966) M.L.J. (Crl.) 226: (1966) 1 S.C.J. 298: (1965) 1 An.W.R. (S.C.) 92: (1965) 2 S.C.R. 837: A.I.R. 1965 S.C. 1564.

2. (1970) 2 M.L.J. 193: (1970) I.L.R. 1 Mad. 104: A.I.R. 1971 Mad. 330.

3. (1977) 2 M.L.J. 141.

marriage could be drawn. In the other decision it was pointed out that the presumption of marriage taking into account the long cohabitation was a rebuttable one and that it was necessary to show that the man and woman not merely were living together, but professed themselves to be husband and wife and were treated as such by relations and friends, and that such conduct and recognition must extend over a long period of time and if there were circumstances, which weakened or destroyed that presumption, the Court could not ignore them. In the present case we have already adverted to the circumstances militating against the possibility of marriage in 1948. There is no proper proof of any marriage having been solemnised in 1948.

26. The question now arises whether there was a valid marriage at any time subsequently. There is no evidence to show that there was any form of marriage gone through at any time subsequently so that one can draw the inference that there was a marriage on any later date even though the marriage may or may not be valid.

27. The validity of the second marriage would be hit by Madras Act (VI of 1949) if the marriage took place subsequent to 1949 Madras Act (VI of 1949) received the assent the Governor-General on 23rd March, 1949 and was published in the Fort St. George Gazette on 29th March, 1949, and became law immediately thereafter. If the marriage had taken place at any time subsequently then the marriage would not be a valid one as far this State is concerned. In the present case, we have seen that there was no marriage earlier than this Act and we have also to come to the conclusion that there was no marriage at any time subsequently, as there is no evidence to support it.

28. The learned counsel for the respondent relied on section 16 of the Hindu Marriage Act, 1955, as amended by Act (LXVIII of 1976). That section provides:

> "Notwithstanding that a marriage is null and void under section 11 any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws Amendment Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act".

This section would have scope for application only if there was solemnization of marriage at any time. In the present case, we have held that there is no proof of solemnization of marriage so that there is absolutely no scope for invoking section 16 of the Act to the facts here.

29. The result is there is no proof of any marriage between the first plaintiff and Meenakshisundaram and that the children born cannot also be treated as legitimate children.

30. Mr. Kesava Iyengar, learned counsel for the appellant during the hearing stated that the second defendant had agreed to make some arrangement for the maintenance of the plaintiffs and for the marriage of the second plaintiff and the third plaintiff either by making a periodical payment or making a lump sum provision. This offer was referred to in paragraph 21 of the judgment of the Court below. The learned counsel stated quite fairly that he stood by this offer even now. We called upon the appellant to file an affidavit to evidence his sticking to his old proposal undertaking to pay a sum of Rs. 50,000. He had undertaken to do so today itself. He has done so. The only development that requires to be noticed at this stage is that a sum of Rs. 16,000 had been paid during the pendency of the appeal and it was stated for the appellant that he would pay the balance of Rs. 34,000 after giving credit to the sum of Rs. 16,000. Mr. Sarvabhauman learned counsel for the respondent does not dispute the factum of such payment of Rs. 16,000 pending appeal. This sum would have to be given credit. Out of the sum of Rs. 34,000 agreed to by the second defendant, he will deposit in the lower Court a sum of Rs. 14,000 on or before 30th June, 1980, and the balance on or before 30th September, 1980. Once the second instalment of Rs. 20,000, is deposited, Rs. 10,000 will be paid to the second plaintiff and for the balance the lower Court may after giving notice to the parties pass appropriate orders as to the investment of the

amount towards the share of the minor third plaintiff till she attains majority. Accordingly, the affidavit filed undertaking to pay as above to the second and third plaintiffs is recorded and there will be a decree in the above terms.

31. Subject to the above, the appeal is allowed, but in the circumstances, there will be no order as to costs.

32. In view of the appeal being allowed it is unnecessary to go into the ownership of the C Schedule properties. The same reason would hold good with reference to the costs also raised in the memorandum of cross-objections. The result is the memorandum of cross-objections is dismissed. There will be no order as to costs in it either.

33. The learned counsel for the respondent sought leave of the Court for filing an appeal to the Supreme Court. The discussion above would go to show that we were concerned mainly with the question whether there was in fact a marriage at all between the first plaintiff and Meenakshisundaram. The finding on this question is entirely based on the evidence and therefore, we do not consider that there is any substantial question of law of general importance which would justify our granting leave. The prayer for leave is, therefore, rejected.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, CJ. and M.A. Sathar, Sayeed, J.*

Poongavanammal ... *Appellant**

v.

Chinnathambi Kounder .. *Respondent.*

(A) *Provincial Insolvency Act* (*V of* 1920), *section* 51 (3)—*Scope and applicability*—"D" *adjudicated insolvent on* 30*th August*, 1961—*Property sold by Official Receiver on* 16*th May*, 1964—*Sale registered on* 11*th September*, 1964—*One* "C" *purchaser—Suit against insolvent filed before adjudication—Decree passed—Execution of decree—Property of insolvent brought to sale—Purchased by* 'P' *on* 9*th March* 1964—*Sale confirmed on* 10*th April*, 1964—*Delivery of possession of property on* 20*th July* 1964—*Suit by* 'C' *against* 'P' *for declaration and possession—Sale in execution held after adjudication cannot prevail over sale by Official Receiver.*

(B) *Practice—Reference to Full Bench, when to be made.*

On the question whether a Court-auction-sale in execution of a decree passed against a person before his adjudication but which took place subsequent to his adjudication as insolvent would prevail over the sale of of the suit property by the Official Receiver in the insolvency proceedings,

Held: The Madras. High Court has been unanimously and repeatedly holding that section 51(3) of the Provincial Insolvency Act has no application to an execution sale taking place after the adjudication.

The observations of Venkatasubba Rao, J. in *Muthan Chettiar* v. *Venkitaswami Naicker*, (1936) I.L.R. 59 Mad. 928 : 71 M.L.J. 170, are only *obiter dicta* and even the learned Judge himself stated that the question did not arise in the case before the Bench. Subsequently Single Judges as well as Benches have also expressed the view that the observations of Venkatasubba Rao, J., were merely *obiter dicta* and the view expressed by the learned Judge was not correct. [*Para.* 11.]

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*L.P.A. No. 26 of 1976, 9*th April*, 1980.

Even when the Bench was requested to refer the question to a Full Bench on the ground that there was a conflict of opinion between Judges of this Court in *Ananthārama Chettiar*, v. *Kuttimalu Kovilamma*, (1916) 30 M L.J. 611 : 3 L. W. 504 and in *Muthan Chettiar* v. *Venkitaswami Naicker*, (1936) I.L.R. 52 Mad, 928 : 71 M.L.J. 170. the Bench declined to make a reference on the ground that the observations of Venkatasubba Rao, J., in *Muthan Chettiar* v. *Venkitaswam Naicker*, were only *obiter dicta* and the said view was not correct. This view of the Bench as well as the *obiter dictum* character of the observation of Venkatasubba Rao, J., as well as the incorrectness of such *obiter dictum* was affirmed by a Full Bench in *Raghava Reddy* v. *Official Assignee, Madras*, (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752 : 77 L. W. 370. [*Para.* 11.]

In accordance with, the earlier views of the High Court the execution sale in favour of the appellant which admittedly took place, after the adjudication of the judgment - debtor as insolvent cannot prevail and section 51 (3) of the Act will have no application to the case of the appellant. [*Para.* 12.]

Cases referred to:—

Bichu Mallikarjuna Rao v. *The Official Receiver*, (1938) 1 M.L.J. 471: 47 L.W. 705: I.L.R. (1938) Mad. 1063 : A.I.R. 1938 Mad. 449; *Karamsetti Guruvaiah* v. *Rangaiah*, (1942) 1 M.L.J. 283: I.L.R. (1942) Mad. 614: 55 L.W. 119: A.I.R. 1942 Mad. 415 (1) : *Anantharama Iyer* v. *Vettath Kuttimalu Kovilamma*, (1916) 30 M.L.J. 611: 3 L. W. 504 ; *Ramaswami* v. *Bagirathi*, (1888) I.L.R. 6 Mad. 180; *Krishnayya* v. *Unissa Begam*, (1891) I.L.R. 15 Mad. 399; *Rayarappan Nambiar* v. *Malikandi Aketh Mayan*, (1914) 26 M.L.J. 267; *Raghunath Das* v. *Sundar Das*, (1914) I.L.R. 42 Cal. 72: 41 I.A. 251: 27 M.L.J. 150: 1 L.W. 567: A.I.R. 1914 P. C. 129; *Muthan Chettiar* v. *Venkitaswami Naiker*, (1936) I.L.R. 59 Mad. 928: 71 M.L.J. 170: 44 L.W. 194: A.I.R. 1936 Mad. 819; *Subramania Aiyar* v. *The Official Receiver*, (1925) 50 M.L.J. 665: 23 L.W. 300: A.I.R. 1926 Mad. 432; *Ramanatha* v. *Vijayaraghavalu*, A.I.R. 1927 Mad. 983; *Sivasami Odayar* v. *Subramanya Aiyar*, I.L.R. (1931) 55 Mad. 316 : 62 M.L.J. 68 : 34 L.W. 908 : A.I.R. 1932 Mad. 95; *Annamalai Chettiar* v. *Lakshmanan chettiar*, (1939) 1 M.L.J. 429: 49 L.W. 383: A.I.R. 1939 Mad. 433; *Raghava Reddy* v. *Official Assignee*, (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752 : 77 L. W. 370 : A.I.R. 1964 Mad. 549; *D.S. Marvadi* v. *M T. Shimpi*, I.L.R. (1959) Bom. 249 : A.I.R. 1959 Bom. 10; *Sri rangamma* v. *Narayanamma*, (1956) An.W.R. 815 : (1956) An.L.T. 755: A.I.R. 1956. Andh. 243.

Appeal under Clause 15 of the Letters Patent against the judgment and decree dated 14th August, 1975 Mr.Justice Varadarajan and made in S.A. No. 942 of 1972 preferred to the High Court against the judgment and decree dated 23rd December 1971 of the Court of the Subordinate Judge, Cuddalore and made in A. S. No. 187 of 1968 (O.S. No. 459 of 1966, D.M.C. Villupuram).

R.S. Venkatachari, for Appellant.

V. Veeraraghavan and *A. Seshan*, for Respondent.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the judgment and decree of Varadarajan, J., dated 14th August, 1975, rendered in Second Appeal No. 942 of 1972.

2. One Dhandapani Reddy was adjudged insolvent in I.P. No. 4 of 1961 on the file of the District Court of South Arcot, Cuddalore, on 30th August, 1961. The suit property was sold by the Official Receiver under Exhibit A-1 dated 16th May, 1964, to the respondent herein and the said sale deed was registered on 11th September, 1964. In O.S. No. 446 of 1960 on the file of the Court of the District Munsif of Villupuram, a decree was passed against the said Dhandapani Reddy. In execution of of that decree, the suit property was brought to sale and the appellant purchased the same on 9th March, 1964, and the said sale was confirmed on 10th April, 1964, and she obtained delivery of possession of the property on 20th July, 1964. It will be seen that the Court-auction-sale in the particular case took place after the adjudication of Dhandapani Reddy as insolvent on 30th August, 1961. It is in that situation, the respondent herein instituted O.S. No. 459 of 1966 on the file of the Court of the District Munsif, Villupuram for declaration of his title to the suit property and for recovery of possession with past and future profits. The claim was based on his purchase under Exhibit A-1 sale deed executed by the Official Receiver,

in the insolvency proceedings. According to him, the Court auction-sale having taken place subsequent to the adjudication of Dhandapani Reddy, the Court-auction-purchaser, namely the appellant herein, did not acquire any title to the property as against the Official Receiver. The point that had to be considered by the Courts below was whether section 52 (3) of the Provincial Insolvency Act, 1920, hereinafter referred to as the Act, applied to such a sale or not. Relying on the decisions of this Court, the Courts below held that the Court-auction-sale did not prevail against the Official Receiver and therefore the sale by the Official Receiver in favour of the respondent herein would prevail. It is that matter which came up to this Court in Second Appeal No. 942 of 1972. Even before this Court, the question that came to be considered was whether the Court-auction-sale that took place subsequent to the adjudication of Dhandapani Reddy would prevail over the sale of the suit property by the Official Receiver in the insolvency proceedings in favour of the respondent herein. Relying upon the two decisions of this Court in *Bachu Mallikarjuna Rao* v. *The Official Receiver, Kistna*[1] and *Karamsetti Guruvaiah* v. *V. Rangiah*[2], as against the decision of the other Courts, Varadarajan, J., held that section 51 (3) of Act will have no application to the sale in question, namely, the sale that took place subsequent to the adjudication, and therefore, the sale by the Official Receiver in favour of the respondent herein would prevail, with the result, the second appeal preferred by the appellant herein was dismissed. However, the learned Judge granted leave and hence the present Letters Patent Appeal.

3. The only question that arises for consideration is whether section 51 (3) of the Act applies to the present case or not. Part III of the Act includes sections 45 to 68. It is captioned as 'Administration of Property'. Under the said heading, there are different sub-headings. One is the sub-heading, 'Effect of insolvency on antecedent transactions'. Under this sub-heading (*Bachu Mallikarjuna Rao's case*[1], *K. Guruvaiah's case*[2],) only sections 51 to 55 find place. Section 51 reads as follows:

"51 (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver."

Whether sub-section (3) of this section will apply to a Court auction sale that takes place subsequent to the adjudication of the debtor as an insolvent, came to be considered by this Court in several decisions. One of the earliest decisions of this Court is in *Anantharama Iyer* v. *Vettath Kuttimalu Kovilamma*[1]. In that case, one Abdul Kadir was adjudged an insolvent on 17th August, 1911. In execution of a decree obtained against Abdul Kadir on 21st January, 1911, certain properties were attached. The Receiver of the insolvent's estate applied to the Subordinate Judge of Calicut on 2nd March, 1912 to stay the sale on the ground that Abdul Kadir had been declared an insolvent. A fresh sale proclamation was issued and the sale was adjourned to 15th April, 1912 on which date the property was sold subject to a mortgage in favour of one Ummar Sahib and was purchased by the second respondent before the High Court. On 19th April, 1912, the Receiver applied to the Court under Order 21, rule 90 of the Code of Civil Procedure to set aside the sale. The Subordinate Judge dismissed the application on the ground *inter alia*, that the insolvency proceedings in the District Court related to the insolvency of a firm of which the judgment-debtor was a member and that the property sold was not the property of the firm but the exclusive property of Abdul Kadir, that the auction-purchaser was a purchaser in good faith and that neither section 47 nor Order 21, rule 90 of the Code of Civil Procedure had any application. On appeal, the District Judge

1. (1938) 1 M.L.J. 471 : 47 L.W. 705 : I.L.R. (1938) Mad. 1063: A.I.R. 1938 Mad. 449.
2. (1942) 1 M.L.J. 283: I.L.R. (1942) Mad. 614: 55 L.W. 119 ; A.I.R. 1942 Mad. 415 (1).

1. (1916) 30 M.L.J. 611: 3 L.W. 504.

dismissed the same holding that Order 21, rule 90 of the Code of Civil Procedure did not apply as there was no irregularity in publishing or conducting the sale. It was that matter which ultimately came up to this Court. The point that came to be considered by the Court is stated in the following contentions advanced on behalf of the appellant before the High Court.

"Mr. Rosario contends (1) that after adjudication no creditor is entitled to proceed against the person or property of the insolvent, and that when it was brought to the notice of the Court by the Receiver that the judgment-debtor had been adjudged an insolvent, the Court ought not to have proceeded with the sale;

(2) that as a matter of procedure the Receiver in whom the insolvent's estate vested on the making of the adjudication order ought to have been made a party to the execution proceedings and that the sale is bad. Mr. Rosario has referred us by way of analogy to certain cases. *Ramaswomi* v. *Bagirathi*[1], which was followed in *Krishnayya*, v. *Unissa Begam*[2] and *Rayarappan Nambiar* v. *Malikandi Aketh. Moyan*[3], where it was held that a sale held without bringing on record the legal representatives of the deceased judgment-debtor is void or a nullity as against the representative of the judgment-debtors.

The Bench proceeded to observe:

"We think that the sale was altogether irregular and that the Court in holding that the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent, acted, if not without jurisdiction, at any rate with material irregularity in the exercise of the jurisdiction of the Court. Section 34 (1) of the Provincial Insolvency Act provides that

'Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the order of adjudication.'

The terms of the section are quite clear and we think, must be given effect to. In this case both the sale and the realisation of the assets took place after the adjudication order was made. We are also of opinion that the judgment-debtor had at the time of the sale no right, title or interest which could be sold or vested in a purchaser and that, consequently the second respondent acquired no title as to the property which had passed to the Receiver on the adjudication order being made. See *Raghunath Das* v. *Sundar Das*[1], Mr. Narasimha Rao for the 2nd respondent relies on sub-clause 3 of section 34 of the Provincial Insolvency Act which provides that 'a person who in good faith purchases the property of a debtor under a sale in execution shall, in all cases acquire a good title to it against the Receiver.'"

'The corresponding provision in the present Act is section 51 (3).

"It appears to us that a purchaser in good faith means a person who did not know at the time of the sale that the judgment-debtor was an insolvent, and could not by the exercise of due diligence have discovered that an adjudication order had been made. The sale in this case was stayed at the instance of the Receiver and adjourned for a month and a fresh sale proclamation was issued. It is difficult to believe that the auction-purchaser could have been unaware of the fact that the judgment-debtor whose property was sold had been declared an insolvent. The insolvency of Abdul Kadir must have been a matter of notoreity in Calicut where the property was sold and the purchaser must have been aware of it. *Further, it is only the purchaser of the property of the 'debtor' who is protected but when the property had vested in the Receiver before the sale it ceased in law to be the property of the debtor and hence section 34 has no application*".

(Italics ours.)

4. The next relevant decision of this Court is *Muthan Chettiar* v. *Venkitaswami Naicker*[2]. Venkatasubba Rao, J., observed:

"The question has really to be decided with reference to section 51, which has not been referred to in that judgment. (*Subra-*

1. (1888) I.L.R. 6 Mad. 180.
2. (1891) I.L.R. 15 Mad. 399.
3. (1914) 26 M.L.J. 267.

1. 22 M.L.J. 150: (1914) I.L.R. 42 Cal. 72: 41 I.A. 251: 1 L.W. 567 : A.I.R. 1914 P.C. 129.
2. (1936) I.L.R. 59 Mad. 928.

mania Aiyar v. *The Official Receiver, Tanjore*[1]. That section, after saying that an execution—credit or is not entitled to the benefit of the execution unless the assets are realised by sale or otherwise, before the admission of the petition, goes on to say in sub-section (3):

A person who in good faith purchases the property of a debtor under a sale in execution shall *in all cases* acquire a good title to it against the receiver."

5. The sale here contemplated must necessarily be that held after the admission of the petition, for, if it be a sale held previous to that, the execution—creditor would become entitled even to the sale proceeds and the property would pass to the purchaser, independent of the question of good faith. Sub-section (3) therefore means, that although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property. As a matter of construction (although this point does not now arise) it would follow that, even in regard to a sale held after the date of adjudication, a *bona fide* purchaser would under this sub-section be protected. This is the view taken, and in my opinion rightly, in *Ramanatha* v. *Vijayaraghavalu*.[2] The further question then remains, was the purchase made in good faith? It has been contended for the Official Receiver that no purchaser having knowledge of the debtor's insolvency can ever be treated as acting in good faith within the meaning of this section. For this position, the learned counsel relies upon *Ananthárama Iyer* v. *Kuttimalu Kovilamma*[2], but I must respectfully dissent from it. I think it is unnecessary to enquire whether or not the purchaser here had notice of the debtor's insolvency; for, granting that he had notice, could it be said that there was want of good faith on his part when he purchased the property as a sale sanctioned by the Court? Two things have to be noticed with reference to this decision. The first is that the statement that is made in the sentence: "As a matter of construction (although this point does not now arise) it would follow that, even in regard to a sale held after the date of adjudication, a *bona fide* purchaser would under this sub-section be protected."

On the face of it, is admittedly *obiter dictum* because, the learned Judge himself says "although this point does not now arise". Secondly, the learned Judge, has dissented from the judgment in *Anantharama Iyer* v. *Kuttimalu Kovilamma*[1]. That being a decision of a Bench of this Court, the Bench of which Venkatasubba Rao, J., was a member, having disagreed with the earlier Bench decision, should have really referred the matter to a Full Bench and ought not to have dissented from that view leaving the subordinate judiciary without proper guidance as to which decision they should follow. It is in view of this position only subsequent decisions treated this observation of Venkatasubba Rao, J., as merely *obiter dictum*.

6. The question came to be considered by another Bench of this Court in *Bachu Mallikarjuna Rao* v. *The Official Receiver, Kistna*[2], Burn, J., referred to the arguments advanced on behalf of the appellant before the Court based on section 51 (3) and the decision in *Muthan Chettiar* v. *Venkitaswami Naicker*[3] and observed.

"Now there is no doubt about the all-embracing character of the words in section 51 (3) of the Provincial Insolvency Act. It does expressly say that a person, who in good faith purchases the property of a debtor under a sale in execution shall *in all cases* acquire a good title against the Receiver. But it must be borne in mind that section 51 of the Provincial Insolvency Act comes under the heading "Effect of insolvency on attendant transactions", and although it has been pointed out by Waller, J. in *Sivasami Odayar* v. *Subramania Aiyar*[4], that section 52 in its present form is entirely out of place under that heading it has never been suggested that section 51 is out of place. It would seem to follow that section 51 can only govern transactions prior to insolvency, *i. e.*, prior to adjudication. If that is so, the words, 'in all cases' in section

1. (1925) 50 M.L.J. 665: 23 L.W. 300: A.I.R. 1926 Mad. 432.
2. A.I.R. 1927 Mad. 983.
3. (1916) 30 M.L.J. 611: 3 L.W. 504.

1. (1916) 30 M.L.J 611: 3 L.W. 504.
2. (1938) 1 M.L.J. 471: I.L.R. (1938) Mad. 1063: A.I.R. 1938 Mad. 449.
3. 71 M.L.J. 170: 44 L.W. 194: (1936) I.L.R. 59 Mad. 928.
4. 62 M.L.J. 8: 34 L.W. 908: (1931) I.L.R. 55 Mad. 316; A.I.R. 1932 Mad. 95.

51 (3) can only mean in all cases prior to adjudication for no part of this section can have any bearing upon transactions subsequent to adjudication. This aspect of the matter has been more fully discussed by my learned brother whose judgment I have had the advantage of reading, and with whom I am in agreement."

7. Again it must be noticed that section 51 (3) deals with purchase of the property of a debtor. Now upon adjudication, the property of an insolvent vests immediately in the Official Receiver, *i. e.*, the property passes to the Official Receiver, and in so far as the judgment-debtor is concerned, there is no property of his which can be sold by the executing Court. This was very clearly stated by their Lordships of the Privy Council in the case of *Raghunath Das* v. *Sundar Das Khetri*[1]. The Judgment of Lord Parker states that in their Lordships' opinion the sale in that case was altogether 'irregular and inoperative'. His Lordship goes on to state three grounds for this opinion:

> 'In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place if proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right. title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property."

It will be seen that the first two grounds stated by Lord Parker relate to matters of procedure, *viz.* (*i*) the sale ought not have been allowed to go on and (*ii*) the sale should certainly not have been allowed to go on without notice to the Official Assignee. These clearly are the grounds on which their Lordships held the sale to be 'irregular'. The third ground however is a matter of substantive right. The right, title and interest of the judgment-debtor having passed to the Official Assignee there was nothing left for the Court to sell in execution. That is why their Lordships say that the sale, besides being irregular, was, 'inoperative'. Then dealing with the controversy based on the decision in *Muthan Chettiar* v. *Venkitaswami Naicker*[1], the learned Judge proceeded to state:—

8. The most recent case and the one most strongly relied upon by Mr. Satyanarayana Rao, is the case of *Muthan Chettiar* v. *Venkitaswami Naicker*[1]. That was a case of a sale held after the admission of the insolvency petition but before adjudication and it was decided that the sale was good as against the Receiver, Mr. Satyanarayana Rao relies upon certain observations made *obiter* by Venkatasubba Rao, J. The learned Judge considers that section 51 (3) applies to all cases, whether the sale is held before the adjudication or after the adjudication. He holds that the Privy Council case of *Raghunatha Das* v. *Sundar Das Khetri*[2], does not apply because in the Indian Insolvency Act there was no provision corresponding to section 51 (3) of the Provincial Insolvency Act. There is however no discussion by the learned Judge of what appears to me, I say it with great respect, to be the most weighty reason for the decision of their Lordships of the Privy Council, *viz.* that the insolvent's property having vested in the Official Receiver upon adjudication, there is nothing left which an executing Court can sell as the property of the debtor.

9. After making the above observations the Bench followed the decision of the earlier Bench in *Anantharama Iyer* v. *Kuttimalu Kovilamma*[3], Burn, J., went to the extent of stating:—

> "So far as I am aware, there is no authority in this Court to the contrary and I am therefore bound to follow it. I do so with greater readiness because, with due respect, I consider it to be altogether sound".

10. In *Annamalai Chettiar* v. *Lakshmanan Chettiar*[4], Wadsworth, J., stated :

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1. 27 M.L.J. 150: 1 L.W. 567: 41 I.A. 251: (1914) I.L.R. 42 Cal. 72 (P.C.).

1. 71 M.L.J. 170: 44 L.W. 194: (1936) I.L.R. 59 Mad. 928.
2. 27 M.L.J. 150 : I.L.R. 42 Cal (P.C.).
3. (1916) 30 M.L.J. 611: 3 L.W. 504.
4. (1939) 1 M.L.J. 429: 49 L.W. 383: A.I.R. 1939 Mad. 433.

"On this question it seems that the matter is concluded by a Bench decision reported in *Mallikarjuna Rao* v. *Official Receiver, Kistna.*[1] the learned Judges reading section 51 in the light of the heading "effect of insolvency on antecedent transactions and holding that it has no relation to transactions taking place after the adjudication. This decision dissents from an *obiter dictum* of Venkatasubba Rao, J. in a case reported in *Muthan Chettiar* v. *Venkituswami Naicken.*[2] I respectfully agree with the learned Judges of the Bench that section 51, sub-section (3) does not apply to a purchase in execution after the adjudication which vests the property in the Official Receiver. The next decision is that in *Karamsetti Guruvioh* v. *V. Rangaiah,*[3] That Bench observed:

"The decision of King, J., dismissing the Second Appeal was based on the judgment of this Court in *Mallikarjuna* v. *Official Receiver, Kistna,*[1] where it was held that sub-section(3) of section 51 of the Provincial Insolvency Act only applies to sales which have taken place before the order of adjudication. Learned counsel for the appellant admits that this decision is against him, as is also the decision of another Bench of this Court, namely that given in *Anantharama Aiyar* v. *Kuttimalu Kovilamma.*[4] He says, however that a contrary opinion was expressed by Venkatasubbarao, J. sitting with Cornish J., in *Muthan Chettiar* v. *Venkituswami Naicken*[2] and in these circumstances he asks that the question be referred to a Full Bench. The judgment of Venkatasubbarao, J., in *Muthan Chettiar* v. *Venkituswami Naicken*[2] in so far as it deals with the question now under discussion, was entirely *obiter*, and the observations of Venkatasubba Rao, J. were fully discussed in the judgment of Burn, J. in *Mallikarjuna* v. *Official Receiver, Kistna.*[1] We see no necessity for a reference to a Full Bench, especially, as the last mentioned case is supported by the Judgment of this Court in *Anantharama Aiyar,* v. *Kuttimalu Kovilamma.*[4]

11. The next decision is that of a Full Bench of this Court in *Raghava Reddy* v. *Official Assignee, Madras.*[1] The Full Bench in that case observed:

"Divergent views have been expressed by the several High Courts on the question whether knowledge *simpliciter* of the pendency of insolvency proceedings on the part of such purchaser would render his purchase any-the less entitled to the protection given by section 53 (3) of the Presidency Towns Insolvency Act. In *D. S. Marvadi* v. *M. T. Shimpi*[2] referring to the differing views expressed by the High Courts, Mudholkar, J. observed:

It seems to me that considering the provisions of sub-sections (2) and (7) of section 28 of the Provincial Insolvency Act along with the provisions of sections 51 and 52 thereof the title of the Receiver to the property of the insolvent would relate back from the date of adjudication to the date of the petition and the auction-purchaser at the sale held in execution of the decree against the insolvent would only get a title defeasible by the Receiver unless he was a purchaser in good faith.

The conflict of views noticed in that case is no less marked between the learned Judges of this Court itself. In *Anantarama Iyer* v. *Kuttimalu Kovilamma*[3], it was observed that a purchaser in good faith meant a person who did not know at the time of the sale that the judgment-debtor was an insolvent, and could not, by the exercise of due diligence, have discovered that an adjudication had been made. That was a case where the Court sale was after the adjudication. The view taken in that case that the protection afforded by section 51 (3) of the Provincial Insolvency Act, corresponding to section 53 (3) of the Presidency Towns Insolvency Act will not be available to the purchaser once an adjudication had been made, was dissented from by Venkatasubba Rao, J. *ad obiter dictum in Muthan Chettiar* v. *Venkataswami Naicken*[4], "That view of Venkata Subba Rao, J. finds support in a recent Full Bench decision of the Andhra High Court in *Srirangamma* v. *Narayanamma*,[5]

1. (1938) 1 M.L.J. 471: 47 L.W. 785 : I.L.R. (1938) Mad 1063: A.I.R. 1938 Mad. 449.
2. 71 M.L.J. 170 : (1936) I.L.R. 59 Mad. 928.
3. (1942) I.L.R. Mad. 614: (1942) 1 M.L.J. 283: A.I.R. 1942 Mad. 415 (1).
4. (1916) 30 M.L.J. 611: 3 L.W. 504.

1. (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 52:77 L.W. 370: A.I.R. 1964 Mad. 549.
2. I.L.R. (1969) Bom. 249: A.I.R. 1969 Bom. 10.
3. (1916) 30 M.L.J. 611: 3 L.W. 504.
4. (1936) I.L.R. 59 Mad. 928: 71 M.L.J. 170.
5. (1956) An.W.R. 815: 1956 An.L.T. 755 : A.I.R. 1956 A.P. 243.

But it has not been accepted by this Court. In *Mallikarjuna Rao* v. *Official Receiver*[1] Burn and Mockett, JJ, accepted the decision in *Anantharama Iyer* v. *Kuttimalu Kovilamma*,[2] In a still later case, *Guruviah* v. *Rangaiah*[3] Leach C.J., and Kuppuswami Aiyar, J., pointed out that the dissent expressed by Venkatasubba Rao, J. in *Muthan Chettiar* v. *Venkituswami*[4] by way of *obiter* was incorrec and that *Anantharama Iyer* v. *Kuttimalu Kovilamma*[2], has been correctly decided.

The principles that emerge by reference to the above decisions are: (1) This Court has been unanimously and repeatedly holding that section 51 (3) of the Act has no application to an execution sale taking place after the adjudication. (2) The observations of Venkatasubba Rao, J., in *Muthan Chettiar*, v. *Venkitaswami Naicken*[4] are only *obiter dicta* and even the learned Judge himself stated that the question did not arise in the case that was before the Bench. Subsequently, single Judges as well as Benches have also expressed the view that the observations of Venkatasubba Rao, J., are merely *obiter dicta* and the view expressed by that learned Judge was not correct. (3) Even when a Bench was requested to refer the question to a Full Bench on the ground that there is a conflict of opinion between the Judges of this Court in *Anantharama Iyer* v. *Kuttimalu Kovilamma*[2] and in *Muthan Chettiar* v. *Venkitaswami Naicken*[4] the Bench declined to make a reference on the ground that the observations of Venkatasubba Rao, J. in *Muthan Chettiar* v. *Venkitaswami Naicken*[4] were only *obiter dicta* and the said view was not correct. (4) This view of the Bench as well as the *obiter dictum* character of the observations of Venkatasubba Rao, J. as well as the incorrectness of that *obiter dictum* were affirmed by the Full Bench in *Raghava Reddy* v. *Official Assignee, Madras*[5]

12. It is against the background of this legal position, we have to consider the request of the learned counsel, for the appellant to refer the matter to a Full Bench. The learned counsel for the appellant contended that several of the Courts have taken a different view, such as the Andhra Pradesh High Court in *Srirangammo* v. *Narayanamma*[1] referred to by the Full Bench in *Raghava Reddy* v. *Official Assignee, Madras*.[2] We are clearly of the opinion that no such course is open to us for the following reasons. In the first place, an earlier Bench of this Court declined to make a reference to the Full Bench on the ground that observations of Venkatasubba Rao, J. were only *obiter dicta* and those observations also were incorrect. Secondly, a Full Bench has affirmed that view and held that this Court had not accepted the view of Venkatasubba Rao, J. accepted by the Full Bench of the Andhra Pradesh High Court in *Srirangamma* v. *Narayanamma*[1] Consequently, without ourselves differing from the earlier Bench decision in *Guruvaiah* v. *Rangaiah*[3] as well as the Full Bench decision in *Raghava Reddy* v. *Official Assignee, Madras*.[2] We cannot make a reference to a larger Bench. We are of the opinion that having regard to this position, we have to simply follow the earlier views of this Court and hold that the execution sale in favour of the appellant which admittedly took place after the adjudication of Dhandapani Reddy as an insolvent cannot prevail and section 51 (3) of the Act will have no application to the case of the appellant herein.

13. The result is the Letters Patent Appeal fails and is dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

1. (1938) 1 M.L.J. 471: I.L.R. (1938) Mad. 1063: A.I.R. 1938 Mad. 449.
2. (1916) 30 M.L.J. 611: 3.L.W. 504.
3. I.L.R. (1942) Mad. 614: (1942) 1 M.L.J. 283.
4. (1936) I.L.R. 59 Mad. 928: 71 M.L.J. 170.
5. (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752.

1. (1956) An.W.R. 815: A.I.R. 1956 A.P. 243.
2. (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752.
3. (1942) 1 M.L.J. 283: A.I.R. 1942 Mad. 415 (1).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, C J., and S. Nainar Sundaram, JJ.*

V. Parthasarathi .. *Appellant**

v.

Chinnappayan and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 43, rule 1—Limitation Act (XXXVI of 1963), Article 116—*Ex parte *decree—Application by defendants to set aside* ex parte *decree—Conditional order passed by trial Court on 13th July, 1976 — Condition not complied with—Petition dismissed on 7th December, 1976—Appeal by defendants against the order dated 7th December, 1976—Plaintiff contending that appeal should have been filed against the order dated 13th July, 1976—Order dated 7th December, 1976 held to be appealable order and the appeal was within time.*

The plaintiff in a suit obtained an *ex parte* decree. The defendants filed an I.A. to set aside the *ex parte* decree. On 13th July, 1976, the trial Court passed the following order:

"Petition allowed on condition that the petitioner deposit Rs. 2,000/ towards the cost of the suit on or before 27th July, 1976, failing which the petition shall stand dismissed. Call on 28th July, 1976."

Thereafter, on 7th December, 1976, the trial Court passed the following order:

"Condition not complied with. Petition dismissed."

Against the order dated 7th December, 1976, the defendants filed an appeal. It was contended by the plaintiff that the appeal should have been filed against the order dated 13th July, 1976, and if the period of limitation was calculated with reference to the order dated 13th July, 1976, the appeal was barred by limitation.

The learned Judge of the High Court who decided the appeal held that the appealable order was the one passed on 7th December, 1976, and, that the appeal was within time. On merits, the learned Judge found that the direction to deposit an amount of Rs. 2,000 was too onerous and therefore while setting aside the order without expressing any opinion on merits, he remitted the I. A. itself back to the trial Court for fresh consideration and enquiry. Against this order, the plaintiff filed the present appeal.

Held: On the terms of the order dated 13th July, 1976, which uses the expression "call on 28th July, 1976", it is apparent that the Court had not finally disposed of the petition. If the petition had been finally disposed of on 13th July, 1976, itself, the Court would not have passed an order on 7th December, 1976, dismissing the petition. The final order passed in the present case was the order that was passed on 7th December, 1976, which alone was the appealable order and therefore the appeal to the High Court was in time.

[*Para.* 6.]

As far as the opinion of the learned Judge that the direction to pay the sum of Rs. 2,000 was too onerous was concerned, there was no justification to take a different view particularly in view of the fact that the learned Judge had remitted the entire application back to the trial Court for fresh consideration and enquiry which would necessarily involve that every question with regard to the I. A. merits would have to be gone into by the trial Court.

[*Para.* 7.]

Cases referred to:—

Chintakayala Ramayya v. Mithinti Lakshmayya, (1944) 1 M.L.J. 387: I.L.R. (1945) Mad. 203: 57 L.W. 292: A.I.R. 1944 Mad. 383; *Balarama Reddi* v. *Subbarama Reddi*, (1953) 1 M.L.J. 40: A.I.R. 1953 Mad. 360.

Appeal under Clause 15 of the Letters Patent against the judgment and decree dated 22nd June, 1979 of Venugopal, J., and made in A.A.O. No. 472 of 1978 preferred to the High Court against the Judgment and order dated 7th December, 1976 and made in I.A. No. 27441 of 1975 in O.S. No. 855 of 1972, City Civil Court, Madras.

R.S. Venkatachari, for Appellant.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the order of Venugopal, J., dated 22nd June, 1979,

* L.P.A. No. 27 of 1980. 18*th June*, 1980.

allowing A. A. O. No. 472 of 1978. The appellant herein was the plaintiff in O. S. No. 855 of 1972 on the file of the City Civil Court, Madras. An *ex parte* decree was passed against the respondents herein on 25th November, 1975. The respondents thereafter filed I. A. No. 27441 of 1975 to set aside the *ex parte* decree. On 13th July, 1976, the Court passed the following order:

> "Petition allowed on condition that the petitioners deposit Rs. 2,000 towards the cost of the suit on or before 27th July, 1976 failing which the petition shall stand dismissed. Call on 28th July, 1976."

Thereafter, on 7th December, 1976 the Court passed the following order:—

> "Condition not complied with. Petition dismissed."

2. Against the order dated 7th December, 1976 the respondents filed the A.A.O. in question. One of the points urged before the learned Judge by the appellant herein was that the appeal was barred by limitation because the appeal should have been preferred against the order dated 13th July, 1976 and not against order dated 7th December, 1976 and if the period of limitation is calculated with referencee to the order dated 13th July, 1976, the appeal was barred by limitation.

3. The learned Judge, however, held that it was only the order dated 7th December, 1976 that was the appealable order and not the order dated 13th July, 1976 and consequently the appeal was within time. On merits, the learned Judge found that a direction to deposit an amount of Rs. 2,000 was too onerous and therefore while setting aside the order without expressing any opinion on merits, remitted the I. A. itself back to the trial Court for fresh consideration and enquiry. It is as against this order, the present appeal has been filed.

4. On the question of limitation, the learned counsel for the appellant contends that there is a direct Bench decision of this Court holding that it is only the earlier order which is appealable and not the later order. Reliance was placed on a Bench decision of this Court in *Chintakayala Ramayya and twelve others v. Mithinti Lakshmayya*[1]. That was also a case where an *ex parte* decree was originally passed and subsequently an application was filed to set aside the *ex parte* decree. The following headnote brings out the point that came to be decided itself in that case:—

> "On three applications to set aside three *ex-parte* decrees respectively the Court passed an order on 5th July, 1943 stating, *inter alia* :
>
> 'The petitioners to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within fifteen days from this date. They shall also deposit costs of the suits as a condition precedent before the trial of the suits which are hereby restored to file and posted peremptorily to 26th July, 1943. In default, the petitions will stand dismissed with costs."

On 26th July, 1943, the Court further ordered:

> "As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand."
>
> *Held*; The order of 5th July, 1943, was final and appealable. The further order of 26th July, 1943 merely recorded the legal position which had arisen from the non-fulfilment of the condition precedent by the petitioners."

Having regard to the terms of the orders in the two cases, we are of the opinion that the said Bench decision will not apply to the facts of the present case.

5. The order passed on 5th July, 1943, in the said Bench decision had set aside the decree and had restored the suit to the file and also posted the suit peremptorily for disposal to a future date, namely, 26th July, 1943. The use of the expression "before the trial of the suits which are hereby restored to file" occurring in the order dated 5th July, 1943, makes it absolutely and abundantly clear that it is the order dated 5th July, 1943, which was the final and appealable order and not any other order which was passed subsequently. Further, the order of 26th July, 1943, merely recorded the legal consequence of the non-implementation of the conditions imposed by the earlier order and the learned Judges were very careful in not even stating that the petitions were dismissed. Consequently, the facts of that Bench decision have no bearing on the present case.

6. The learned counsel for the appellant then brought to our notice another judgment of

1. I.L.R. (1945) Mad. 203: (1944) 1 M.L.J. 381: 57 L.W. 292: A.I.R. 1944 Mad. 383.

this Court in *Balarama Reddi* v. *Subbarama Reddi and another*[1]. That was a judgment of Mack, J., who followed the Bench decision referred to above. Here again, the facts as stated in the judgment itself are as follows:—

> "This (the suit) was decreed *ex parte* on 9th January, 1948. He (the defendant) filed an application to set aside the decree on 23rd January, 1948. On this an order was passed on 19th January, 1949, directing the decree to be set aside on certain conditions. that Rs. 25/-was to be paid by 7th February, 1949, and in default, the application was to be dismissed. The petition was called on 8th February, 1949 and the Court passed a further order 'costs not paid, dismissed'."

Here again, the facts of that case will not apply to the facts of the present case. In the present case, as we pointed out already, there is an additional direction in the order dated 13th July, 1976 to call the petition on 28th July, 1976. This very direction clearly shows that the Court deliberately and consciously kept the petition on file without finally disposing it of. For instance, in the present case, if on 26th July, 1976 or on 27th July, 1976 had the respondents, filed an application for extension of time for the deposit of the amount, certainly the Court had the power to extend the time. On the other hand, if we read the order dated 13th July, 1976 as the final order ultimately disposing of the I.A. itself, the Court would have no such power. We are not resting our conclusion on the ground that the Court should always reserve such a power. However, on the terms of the order dated 13th July, 1976 which uses the expression "call on 28th July, 1976", we are of the opinion that the Court had not finally disposed of the petition. If the petition had been finally disposed of on 13th July, 1976, itself, the Court would not have passed an order on 7th December, 1976 dismissing the petition. If the order dated 13th July, 1976 is construed to be a final order on the application, it will mean one or the other of the following two things. One is that the application was allowed on 13th July, 1976 itself in which event the respondents herein cannot be said to be aggrieved by the order except to the extent of the condition imposed, enabling them to prefer an appeal. If the application was allowed on 13th July, 1976 itself the same application cannot be subsequently dismissed on 7th December, 1976. The other is that the application was dismissed on 13th July, 1976 itself or automatically got itself dismissed on 27th July, 1976 when the respondents did not pay the amount and in that case, there could not have been a subsequent dismissal of the very same application. If it is so construed, it will mean that the application was dismissed twice by the Court, once on 13th July, 1976 and again on 7th December, 1976, and certainly such a result could not have been contemplated or countenanced. Therefore, we are clearly of the opinion that the final order passed in the present case was the order that was passed on 7th December, 1976 which alone was the appealable order and therefore the appeal to this Court was in time.

7. As far as the opinion of the learned Judge that the direction to pay the sum of Rs. 2,000/ was too onerous is concerned, we do not see any justification to take a different view particularly in view of the fact that the learned Judge has remitted the entire application back to the trial Court for fresh consideration and enquiry which will necessarily involve that every question which regard to the I. A. on merits will have to be gone into by the trial Court. In view of this, the appeal fails and the same is dismissed.

S. J. —— *Appeal dismissed.*

1. (1953) 1 M.L.J. 40: A.I.R. 1953 Mad. 360.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

Steel Authority of India Limited .. *Appellant**

v.

The Union of India owning Southern Railway, Madras-3 and another .. *Respondents.*

The Trustees of the Port of Madras .. *Appellant*

v.

Hindustan Steel Limited, Madras and others .. *Respondents.*

and

The Trustees of the Port of Madras, represented by its Chairman .. *Appellant.*

v.

The Hindustan Steel Limited, Madras .. *Respondents.*

Indian Railways Act (IX of 1890), *section* 80—*Madras Port Trust Act (II of* 1905), *section* 110—*Carriage of goods through Railways from Durgapur to Madras Harbour — Consignee taking delivery from Madras Port Trust—Shortage in delivery—Suit filed for recovery of the value of shortage—Madras Port Trust liable as destination railway—Suit however dismissed as barred by time under section* 110 *of the Madras Port Trust Act.*

H.S. Ltd., booked at Railway risk from Durgapur a consignment of 18.750 metric tonnes of steel billets on 25th November, 1969 in a wagon to be delivered to it at Madras Harbour. This wagon arrived in Madras Harbour on 13th December, 1969 with packing conditions disturbed. H. S. Ltd., requested for reweighment before delivery. On reweighment, the consignment weighed only 10·136 metric tonnes as against the R. R. Quantity of 18.750 metric tonnes, resulting in a shortage of 8.614 metric tonnes, the value of which was Rs. 25,637.24 as per the invoice. H. S. Ltd., filed a suit against the Union of India, owning the Southern Railway and the Madras Port Trust. The trial Court held that the Madras Port Trust was liable as the destination railway, but the suit was dismissed as barred by limitation under section 110 of the Madras Port Trust Act. On appeal by the plaintiff.

Held, that the Madras Port Trust being the destination railway, it is liable to meet the suit claim even though the plaintiff had not proved that loss or shortage of the goods occurred when the goods were in movement in the Port Trust Railway. The Court below was right in holding that the suit was barred by limitation, under section 110 of the Madras Port Trust Act, 1905. [*Para.* 8]

Cases referred to:—

Trustees, Bombay Port v. *Premier Automobiles Ltd.,* (1974) 3 S.C.R. 397: (1974) 4 S.C.C. 710: A.I.R. 1974 S.C. 923; *Madras Port Trust* v. *Home Insurance Company, Ltd.,* (1968) 2 M.L.J. 497: 81 L.W. 594: I.L.R. (1969) 1 Mad. 641: A.I.R. 1970 Mad. 48; *Manicklal* v. *Trustees of the Port of the Madras,* (1974) 87 L.W. 490.

A. S. No. 311 *of* 1976. Appeal against the decree of the City Civil Court, (III Asst. Judge), Madras, dated 23rd July, 1975, and passed in O. S. No. 3209 of 1972.

S. A. No. 913 *of* 1976. Appeal against the decree of the City Civil Court (Principal Judge), Madras, dated 30th April, 1975 and passed in Appeal Suit No. 16 of 1975 preferred against the decree of the City Civil Court (IX Assistant Judge), Madras, dated 15th February, 1974 and passed in Original Suit No. 6036 of 1972. etc.

B. Rajagopalan, for Appellant.

P. S. Srisailam, for Respondent No. 1.

R. G. Rajan, D. V. Sivagnanam and *V. Muthuswamy,* for Respondent No. 2.

The Judgment of the Court was delivered by

Ramanujam J.—These appeals arise out of four suits filed by the same consignee for

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* A.S. No. 311 of 1976 and S.A. No. 913 of 1976; 796 and 1846 of 1977 respectively.

18th March, 1980.

compensation against the railways for short delivery of the goods and the common questions that arise in all these appeals are:—

(1) When the goods are carried by various railways, which of the railways is liable for the shortage ?

(2) Whether the suits so far as they relate to the Madras Port Trust will be barred by the provisions of section 110 of the Madras Port Trust Act, 1905?

A.S.No. 311 *of* 1976.—Hindustan Steel Limited, the plaintiff in O.S. No. 3209 of 1972 on the file of the City Civil Court, Madras, is the appellant herein. Hindustan Steel Limited, hereinafter referred to as the company, booked at railway risk from Alloy Steel Plant, Durgapur-8, a consignment of 18.750 metric tonnes of Alloy Steel Billets and Rounds under railway invoice, dated 25th November, 1969, in a wagon to be delivered to it at Madras Harbour. The aforesaid wagon arrived in Madras Harbour on 13th December, 1969 with packing conditions disturbed. Hence the plaintiff-company requested for re-weighment before delivery. On re-weighment, the materials were found to weigh only 10.136 metric tonnes of Alloy Steel Billets as against the R.R. quantity of 18.750 metric tonnes, resulting in a shortage of 8.614 metric tonnes of Alloy Steel Billets, the value of which was Rs. 25,637.24 as per the invoice. The plaintiff therefore filed the said suit against the Union of India, owning the Southern Railway and the Madras Port Trust as defendants 1 and 2 for recovery of the said sum of Rs. 25,637.24, being the value of the shortage on the ground that the defendants are jointly and severally liable to the plaintiff to the said sum as the shortage had occurred as a result of the negligence on their part. Before filing the suit, the company had issued a notice under section 78 (*b*) of the Indian Railways Act, 1890, on 30th January, 1970. It had also sent a notice required under section 110 of the Madras Port Trust Act, 1905 on 3rd March, 1970. It further sent a notice under section 80 of the Code of Civil Procedure on 30th November, 1971.

3. The suit was resisted by the first defendant contending that it was not aware of the alleged re-weighment done by the Madras Port Trust at its premises, nor was any notice given to them before reweighment, that a wagon in question was correctly handed over to the Madras Port Trust, the second defendant, that the second defendant had accepted the wagon, without any remarks, in sound condition and therefore the second defendant is estopped from contending that the alleged shortage had occurred due to the negligence of the Southern Railway. It specifically denied any negligence or misconduct on its part and stated that it had exercised all reasonable care in the carriage of goods and it put the plaintiff to strict proof of the actual damage. It also pleaded that the second defendant being the destination railway, it alone is answerable to the consignee for the shortage. The first defendant also pleaded that it being an intermediate railway, it is not liable to the suit claim unless damage is proved over the southern railway.

4. The second defendant, the Madras Port Trust, resisted the suit contending that a consignment said to contain 657 pieces of steel Billets and Rounds was despatched from Durgapur Steel Plant Exchange-yard, a station on the Eastern Railway to Madras Harbour in a wagon and the said wagon arrived at Madras Harbour on 13th December, 1969 with packing disturbed, that the plaintiff alleging that substantial quantity had been pilfered *en route*, requested the Port Trust to deliver on weighment, that on re-weighment, it was found to weigh 10.136 metric tonnes as against 18.750 metric tonnes, showing a shortage of 8.614 metric tonnes, that the deficiency was immediately notified by a telegram to the Eastern Railway, South Eastern, South Central and Southern Railways as per Indian Railways Conference Association Rules, calling upon them to accept liability for the shortage noticed in the wagon, but that they had not so far signified of their acceptance of liability, that so far as the Port Trust is concerned, it had delivered the consignment in the same condition as received by it and as such there was no negligence or carelessness on its part, that it had taken as much care of the goods as a prudent man would take of his own goods in similar circumstances and that therefore the Port Trust is not liable to meet the suit claim in any event. The second defendant contended that in any event, the suit so far as the second defendant is concerned, is barred by limitation under section 110 of the Madras Port Trust Act, 1905.

5. After considering the evidence, both oral and documentary, the Court below held that there was a short delivery of 8.614 metric tonnes

of the steel billets of the value of Rs. 25,637.24, that the Southern Railway the first defendant, being an intermediate railway and the shortage not having been traced to that railway, is not liable to meet the suit claim, and that the Port Trust, the second defendant, being the destination railway is liable to meet the suit claim. However it dismissed the plaintiff's suit on the ground that the suit is barred by limitation under section 110 of the Madras Port Trust Act, 1905. Aggrieved against the dismissal of the suit, the plaintiff has filed this appeal.

6. In this appeal, the finding of the Court below that there was, in fact a short delivery as alleged by the plaintiff, has not been challenged by the respondents. We therefore, proceed on the basis that there was in fact a short delivery. The other finding of the Court below is that the first defendant being the intermediate railway was it not liable to meet the suit claim, but the second defendant, which is the destination railway, alone is liable, is challenged by the Port Trust. The finding on the question of limitation, on the basis of which the suit came to be dismissed has been challenged by the plaintiff.

7. Section 73 of the Indian Railways Act, 1890 imposes in general a responsibility for the loss, destruction, damage, deterioration or non-delivery in transit of goods delivered to the administration to be carried by railway, subject to the exceptions provided therein. Section 80 of the Indian Railways Act provides that a suit for compensation for loss, destruction, damage, deterioration or non-delivery of goods, may be instituted, if the goods were booked through over the railway of two or more railway administrations against that railway administration, to which the goods were delivered for carriage or against the railway administration on whose railway the destination station lies, or the loss, injury, destruction, damage or deterioration occurred, and such a suit is to be instituted in a Court having jurisdiction over the place at which the goods were delivered for carriage or over the place in which the destination station lies, or the loss, injury, destruction, damage or deterioration occurred. In this case, the goods were booked with the Eastern Railway, Calcutta, on 25th November, 1969, and they were carried by the Eastern Railway, South Eastern Railway, South Central Railway, Southern Railway and ultimately the Madras Port Trust Railway. Under section 80 of the Indian Railways Act, a suit for compensation has to be instituted against the railway administration from which the goods were booked or the railway administration on whose railway the destination station lies. The Eastern Railway which booked the goods has not been made a party to the suit. The suit has been filed only against the Southern Railway as well as the Port Trust Railway. According to the first defendant, the Madras Port Trust railway is the destination railway and therefore it alone is liable to pay compensation for the short delivery. According to the second defendant, however, though the Port Trust owns the railway, it is not a railway administration as defined in the Indian Railways Act and therefore the Southern Railway, the first defendant, alone is to be treated as the destination railway and made liable for the suit claim. The question is, as between the first and second defendants, who is liable for the short delivery of the goods in this case and that question will naturally depend on the further question which among the defendants is the destination railway. The question as to which of the railways is the destination railway has loomed large because of the fact that the plaintiff has not proved that the loss or shortage has occurred while the goods were in transit in any particular railway. As a matter of fact, the plaint proceeds on the basis that the defendants are liable only as destination railways. It is not in dispute that the goods were taken delivery of by the plaintiff only from the Port Trust railway and not from the Southern railway. If the Port Trust railway is a railway administration as defined in the Railways Act, then the Port Trust railway alone will be the destination railway. But, if as contended by the learned counsel for the Port Trust, that Port Trust railway cannot be taken to be a railway administration as defined in the Railways Act, then the Southern Railway will be the destination railway. The question for consideration then is whether the Port Trust railway is a railway administration as defined in the Railways Act.

8. The Madras Port Trust constituted and functioning as a statutory authority under the provisions of the Madras Port Trust Act, 1905, has been authorised to run a railway for certain purposes. Section 35 of the Madras Port Trust Act, 1905, states that the Board of trustees may execute such works and provide such appliances as it may determine to be neces-

sary or expedient for the purposes of the Port and section 36 provides that such works and appliances may include.

"(1) ....

(2) railways, tramways, locomotives, rolling-stock, sheds, ware houses and other accommodation for passengers and goods and other appliances for carrying passengers and for conveying, receiving and storing goods, landed, or to be shipped or other wise."

Section 39 (1) provides that the Board shall, according to its powers, provide all reasonable facilities for and shall have power to undertake the following services.

"(*a*)...... ....

(*b*) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(*c*) ....

(*d*) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or *vice versa*, as a railway company or administration under the Indian Railways Act, 1890."

Sub-section (*d*) of section 39 says that the Board shall, if so required by any owner, perform in respect of his goods all or any other services mentioned in clauses (*b*) and (*d*) of sub-section (1), unless any of the services had been relinquished by it under the provisions of section 41-A. Section 40 provides that the responsibility of the Board for the loss, destruction or deterioration of the goods, of which it had taken charge, shall, subject to the other provisions of the Act and subject also in the case of goods received for carriage by railway to the provisions of the Indian Railways Act, 1890, be that of a bailee under sections 151,152 and 161 of the Indian Contract Act. Under these provisions, the Port Trust is in charge of receiving, removing, shifting, transporting, storing or delivering goods brought into the Port premises and for carrying on those services, it is authorised to own and run railways, tramways, locomotives, rolling-stock, sheds, warehouses other appliances for conveying, receiving and storing the goods landed, or to be shipped or otherwise. The learned counsel for the Port Trust submits that having regard to the object of the Madras Port Trust Act, 1905, which is to regulate, conserve and improve the Port of Madras, the Port Trust is expected mainly to carry passengers and also goods landed or to be shipped and is not expected to provide transport to the general public, who have nothing to do with the Port, and this appears to be clear from the provisions in section 39 (*d*). Section 39 (*d*) of the Madras Port Trust Act atuhorises the Board to undertake the service of receiving, delivering, transporting and booking and despatching originating in the vessels in the Port and intended for carriage by the neighbouring railways, or *vice versa*, as a railway company or administration under the Indian Railways Act, 1890. Based on this provision, it is contended by the learned counsel on behalf of the Port Trust that only while receiving, transporting and booking and despatching the goods originating in the vessels in the Port and intended for carriage by the neighbouring railways or *vice versa* the Port Trust could be treated as a railway administration and not in any other context. But the submission of the learned counsel overlooks section 35 (2), which says that the Port trust can own railways, tramways, locomotives and other appliances for conveying, and receiving goods landed or to be shipped or otherwise. According to this provision, the railway established and owned by the Port Trust may also be used for purpose of other than transporting the goods landed or to be shipped. The word "otherwise" occurring in that provision clearly indicates that the railway owned by the Port trust can be used for purposes of transport of goods other than the goods landed or to be shipped. It is not, therefore, possible to agree with the learned counsel for the Port Trust that the Port Trust is not engaged in any services to goods other than to be shipped or to be landed. For deciding the question whether the Port Trust railway is a railway administration, for the purpose of section 80 of the Indian Railways Act, we have to look into the definition of "the railway administration" under that Act. "Railway" has been defined in section 2 (4) of the Indian Railways Act, 1890. As per the definition "railway" means, a railway, or any portion of a railway, for the public carriage of passengers, animals or goods. "Railway company" is defined in section 3 (5) to include any persons, whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway. The defini-

tion of "railway company" is wide enough to include any person, owning or running a railway and this definition will therefore taken in even a statutory body like the Madras Port Trust, if it owns and runs a railway. Section 3 (6) defines "railway administration" as the carrier of the railway in the case if the railway is administered by the Government and in the case of a railway administered by a railway company, means the railway company. Admittedly the Madras Port Trust owns and runs a railway, though its operations are confined within its premises. None-the-less, having regard to the fact that the railway is intended for the public carriage of passengers and goods, it will come within the definition of railway and railway administration as defined in the Railways Act. Therefore, by virtue of operation of section 80 of the Indian Railways Act, the Port Trust railway is to be taken as the destination railway, for, it is not disputed that the Port Trust railway, took charge of the goods from the Southern Railway and delivered the goods to the plaintiff, the consignee of the goods. Therefore, it has to be held that the Port Trust being the destination railway, it is liable to meet the suit claim even though the plaintiff has not proved that loss or shortage of the goods occurred when the goods were in movement in the Port Trust railway. The Court below is therefore right in holding that the second defendant alone is liable to meet the suit claim.

9. The next question that arises for consideration is whether the suit is barred by limitation under section 110 of the Madras Port Trust Act, 1905. Section 110 of the Madras Port Trust Act, 1905, is as follows:—

> "No suit or other proceeding shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the case thereof, nor after six months from the accrual of the cause of such suit or other proceeding."

According to this section, no suit shall be commenced against any person for anything done or purporting to be done in pursuance of the Act, without giving to such person one month's previous notice in writing of the intended suit and of the cause thereof, nor after six months from the accrual of the cause of action for such suit. In this case admittedly the suit has been filed beyond six months referred to in section 110 of the Act. It is, therefore, contended by the second defendant that the suit is barred by limitation. According to the learned counsel for the plaintiff/appellant a suit against a carrier like the second defendant for compensation for non-delivery or of short delivery of the goods can be filed within a period of three years when the goods ought to be delivered, under Article 11 of the Limitation Act, 1963, and that the suit not being one for anything done/or purported to be done under the Port Trust Act, the limitation provided in section 110 of the Madras Port Trust Act will not apply. We are not inclined to accept this contention of the learned counsel for the appellant for the reasons, which we have already given above in connection with the Board's power to own and run railway. We have held that the Port Trust in owning and running a railway is performing one of the functions assigned to it under the Act, and, therefore the shortage alleged being with reference to one of its duties as a carrier, the suit for compensation should be taken to be in connection with an Act done by the Port Trust under the provisions of the Madras Port Trust Act.

10. In *Trustees Bombay Port* v. *Premier Automobiles Limited*[1], the scope of section 87 of Bombay Port Trust Act, 1879, which corresponds to section 110 of the Madras Port Trust Act, 1905, came up for consideration. In that case, a consignment of 53 bundles of mild steel plates despatched by a Japanese exporter to be delivered at the Port of Bombay was short delivered by one bundle on 19th September, 1959. The consignee demanded the missing bundle. But he was being assured that search for the missing bundle was in progress. Ultimately the plaintiff filed a suit for compensation after six months from the date of delivery. The Port Trust raised among other defences the plea of limitation. This plea was ultimately upheld by the Supreme Court on the ground that where a statute imposes a duty, the omission to do something that ought to be done in order completely to perform that duty, or continuing to have any such duty unperformed, amounts to an act done or intended to be done within the meaning of a statute which provides a special period of limitation for such an act, and that

1. (1974) 3 S.C.R. 397: (1974) 4 S.C.C. 710: A.I.R. 1974 S.C. 923.

section 87 will stand attracted not merely when an act is committed, but also when an omission occurs in the course of the performance of that act. In *Madras Port Trust* v. *Home Insurance Company Limited*[1], the scope of section 110 of the Madras Port Trust Act came to be considered. In that case also, a suit was filed by the consignee for compensation for short delivery, after the period of six months referred in section 110. One of the questions urged by the consignee was that the shorter period of limitation provided under section 110 will apply only in respect of compulsory services rendered by the Port Trust and not in respect of optional services, which the trustees may undertake in their discretion. A Division Bench of this Court pointed out that when the Board took charge of the goods under section 39 of the Madras Port Trust Act, the responsibility of the Board for the loss, destruction or deterioration of the goods of which it has taken charge under section 40 is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, that the Board as a bailee is bound to take as much care of the goods bailed to it, as a man of ordinary prudence under similar circumstances will take care of his own goods, that the loss or damage of the goods entrusted to a bailee is *prima facie* evidence of negligence, that a breach of the statutory duty as well as an omission to perform a statutory duty, would both fall under the protection given by the provisions of section 110, that the Board's default in delivering the goods is closely connected with what the Board has to do in the matter of receiving, removing, shifting, transporting, storing or delivering the goods brought within its premises and that therefore any action, which is called for will properly be covered by the words "anything done or purporting to be done in pursuance of the Act", that the language is of sufficient amplitude to cover even the class of functions for which no duty is cast by section 39 (1) but only power is given to undertake, that though the duty undertaken by the Board is not an obligatory one, the protection of section 110 will still be available as what was done was only in pursuance of the Act, and that, therefore, once the Board assumes and undertakes a function under the Act, whether optional or obligatory, it can call in aid the protection afforded under section 110. The Court also pointed out that where there is a special period of limitation having its own starting point, the Court is bound to apply it notwithstanding any inconvenience that may arise from its literal application. The above decisions clearly support the stand taken by the Port Trust that the present suit, having been filed more than six months, is barred by limitation. The learned counsel for the respondents will, however refer to a decision of Ismail, J. (as he then was), in *Manicklal* v. *Trustees of the Port of the Madras*[1]. On a close perusal of the judgment, we are of the view that it cannot be of any assistance to the appellant here. That was a case of demolition by the Port Trust of a building erected by a licencee within the Port premises and the licencee claiming compensation arising out of such demolition. The Court took the view that the demolition of the licencee's superstructure by the Port Trust authorities cannot be said to be anything done or purporting to have been done in pursuance of the Madras Port Trust Act, so as to attract the application of section 110 of the Act. Thus the case related only to an act, which was not done under the provisions of the Act and therefore, it was rightly held that section 110 was not attracted. We are, therefore, of the view that the Court below was right in holding that the suit was barred by limitation. The appeal has therefore to be dismissed and it is dismissed accordingly but without costs.

11. *S. A. No.* 913 *of* 1976.—In this appeal, the appellant is aggrieved against the dismissal of its suit, claiming compensation for short delivery on the ground that it is barred by section 110 of the Madras Port Trust Act. The facts in this case are more or less similar to the facts set out in A. S. No. 311 of 1976 and the consignee is also the same. The Court below has specifically found the shortage alleged by the plaintiff had been established, but that the first defendant, Southern Railway is not liable on the ground that it is an intermediate railway and that the Port Trust is alone liable for the shortage being the destination railway but that the suit was against the Port Trust is barred in view of section 110. For the reasons given by us in A.S. No. 311 of 1976, this appeal has also to be dismissed and it is dismissed accordingly with costs.

1. (1968) 2 M.L.J. 497: 81 L.W. 594: I.L.R. (1968) 1 Mad. 641: A.I.R. 1970 Mad. 48.

1. (1974) 87 L.W. 490.

12. *S. A. No.* 796 *of* 1977.—In this appeal, the Port Trust, is the appellant. In this case, the Court below had held that the suit, though filed after a period of six months referred to in section 110 of the Madras Port Trust Act, was in time. Aggrieved against the said finding of the Court below, the Port Trust has come before us. For the reasons given by us in A.S. No. 311 of 1976, any suit for recovery of compensation against the Port Trust in respect of any act done or purporting to have been done under the Port Trust Act has to be filed within a period of six months from the date of the cause of action. Therefore the finding of the Court below that the suit was not barred by limitation cannot be accepted. Following our reasoning in A.S. No. 311 of 1976 we have to hold that the suit as against the Port Trust having been filed more than six months after the cause of action is barred by time. But fortunately for the plaintiff in the suit, it has impleaded by way of abundant caution all the railways through which the goods passed and the Eastern Railway, which is the originating railway has been impleaded as a third defendant in the suit. Having regard to the provisions in section 80 of the Indian Railways Act, the consignee can claim compensation for the short delivery either as against the originating railway or against the destination railway. In this case, the suit as against the Port Trust railway, which according to us is the destination railway, has been held not liable in view of the bar contained in section 110 of the Madras Port Trust Act. But there is no bar for the grant of decree to the plaintiff as against the third defendant, the originating railway. Order 41, rule 33 of the Code of Civil Procedure will enable this Court to give relief to a respondent as against a co-respondent in the appeal. Rule 33 of Order 41 of the Code of Civil Procedure, enables the appellate Court to pass any decree which ought to have been passed by the trial Court. The illustration to that rule will clearly indicate that in a suit against both the defendants, if a decree is obtained by the plaintiff against one and if the appellate Court feels that the decree should have been passed only against the order defendant, the appellate Court can pass a decree against the other defendant. In this view of the matter, while setting aside the decree of the trial Court passed against the Port Trust in favour of the plaintiff we grant a decree in favour of the plaintiff as against the Eastern Railway, the third defendant as prayed for in the suit with costs. This second appeal is therefore allowed and the decree of the lower Appellate Court is modified. There will, however, be no order as to costs.

13. *S. A. No.* 1846 *of* 1977.—In this appeal, both the Courts below have passed a decree against the Port Trust as the destination railway as the suit has been found to be in time. The Port Trust is challenging the decree on the ground that it cannot be treated as the destination railway. We have already held in A.S. No. 311 of 1976 that the Port Trust will be the destination railway and that therefore the suit has rightly been filed against the Port Trust railway. In this case, the Port Trust has not challenged the finding of the Courts below that there was a shortage. In fact, the Port Trust cannot challenge the factum of shortage as it has granted a certificate to the plaintiff consignee, noting the shortage at the time of the delivery. The only question is to which of the railways through which the goods were carried is liable for the short delivery. According to the Port Trust, even in spite of section 80 of the Indian Railways Act, if the Port Trust establishes by positive evidence that it has not acted negligently and, that the loss or damage had not occurred while the goods were carried by it, it will not be liable to meet the plaintiff's claim, and in such case the plaintiff can proceed only against the originating railway. The learned counsel refers to Exhibits B-4, B-5 and B-6, which are letters sent by the Port Trust to the Eastern Railway, intimating the shortage and asking the Eastern Railway to meet the plaintiff's claim and contends that having regard to the fact that the Port Trust had delivered the goods, which it has actually taken charge of, the plaintiff can proceed only against the originating railway or the railway in which the actual loss had occurred. These exhibits indicate that so far as the Port Trust was concerned, it has delivered the goods, which it had actually taken charge of from the Southern Railway, and that at the time of its handling the goods, it found that the packing has been tampered, while the goods were in transit with the other railways. The complaint of the learned counsel for the Port Trust is that the relevancy of these documents has not been considered by the Courts below and that in the interests of Justice has to be considered afresh in the light of the above documents by the lower appellate Court. A perusal of the judgment of the lower

appellate Court indicates that it addressed itself only to the question as to whether the Port Trust is a railway administration and having held that the Port Trust is a railway administration, it proceeded to hold it is liable for the suit claim as the destination railway. It was not, however, referred to the documents, Exhibits B-4, B-5 and B-6 filed by the Port Trust for the purpose of showing that the loss or shortage had not occurred while the goods were in its charge. Since, we are of the view that the relevancy of these documents has not been considered by the lower appellate Court, the matter has to be remitted to it for fresh consideration.

14. This second Appeal is therefore allowed and the matter is remitted to the lower appellate Court for fresh consideration of the question of the second defendant's liability in the light of the documents Exhibits B-4 to B-6. There will, however, be no order as to costs.

S. J.

A.S.No. 311 *of* 1976 *dismissed.*
S.A.No. 913 *of* 1976 *dismissed.*
S.A.No. 796 *of* 1977 *allowed.*
S.A.No. 1846 *of* 1977 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: *M. M. Ismail, CJ., and M. A. Sathar Sayeed, JJ.*

The Management of Machine Tools and Ancillaries Casting (P.) Ltd., Madras .. *Appellant**

v.

The Additional Labour Court, Madras and others .. *Respondents.*

Model Standing Orders, Order 17 (4) (*c*) *— Domestic Enquiry—Dismissal of employee—Domestic enquiry fair and proper — Show cause notice why punishment of dismissal should not be imposed, not given to the employee—Order of Labour Court setting aside dismissal and directing reinstatement —Order upheld.*

Held, that the order of dismissal passed in the present case after a domestic enquiry without giving an opportunity to the employees as contemplated in Order 17 (4) (*c*) of the Model Standing Orders is invalid and therefore the Labour Court was justified in setting aside the same. [*Para.* 5.]

Even assuming that the Labour Court should conduct an enquiry with regard to the proposed punishment and cannot straightway direct reinstatement, no request had been made to the Labour Court by the appellant in this behalf. [*Para.* 6.]

Cases referred to:

Mrs. Lakshmiratan Cotton Mills Co. Ltd. v. *v. Its Workmen*, (1975) 2 Lab. L.J. 174: 31 Fac. L.R. 31: 47 F.J.R. 350: (1975) Lab. I.C. 1204: A.I.R. 1975 S.C. 1689; *Oriental Textile Finishing Mills* v. *Labour Court*, (1972)2 S.C.J. 484: (1972) 1 S.C.R. 490: A.I.R. 1972 S.C. 277; *Delhi Cloth and General Mills Co. Ltd.* v. *Judh Budh Singh*, (1972) 2 S.C.J. 347: (1972) 1 Lab. L.J. 180: (1972) 3 S.C.R. 29: A.I.R. 1972 S.C. 1031.

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice

* W.A. No. 210 of of 1977.

18*th August*, 1980.

Mohan, dated 6th August, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in W. P. No. 2881 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records in I.D. No. 159 of of 1971 on the file of the Labour Court, Madras and quash its award at 9th March, 1973 published in Supplement to Part II, section 1 of the Tamil Nadu Gazette dated 21st March, 1973.

K. R. Vijayakumari, for Appellant.

P. K. Gopalaraju, for Respondents 2 to 8.

The Judgment of the Court was delivered by

Ismail, CJ. — This is an appeal against the order of Mohan, J. dated 6th August, 1976 dismissing Writ Petition No. 2881 of 1973 filed by the appellant herein. The matter lies within a very narrow compass. Respondents 2 to 9 were the employees of the appellant herein and their services were terminated. The non-employment of those persons was referred to the Additional Labour Court, Madras. The Additional Labour Court by its award dated 9th February, 1973 directed reinstatement of the respondents 2 to 9. To quash this award, the writ petition was filed and the writ petition having been dismissed, the present appeal has been filed.

2. The Labour Court as a fact found that the domestic enquiry was fair and proper. Nevertheless it held that the dismissal was invalid on the ground that a notice to show cause why the punishment of dismissal should not be imposed on the respondents 2 to 9 was not issued to them before passing the orders in question as required by Order 17 (4) (*c*) of the Model Standing Orders applicable to the appellant's concern as contained in the Tamil Nadu Industrial Employment (Standing Orders) Rules, 1947. It is admitted that in this case there is no registered standing orders and consequently it is the Model Standing Orders that will apply to the appellant herein. Order 17(4) (*c*) of the Model Standing Orders, reads as follows:

> "If on the conclusion of the enquiry or, as the case may be, of the criminal proceedings, the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned, a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or suspension or fine or stoppag of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an order accordingly".

There are more than one provisos to this order and it is unnecessary to refer to those provisos.

3. Admittedly, after the domestic enquiry was over, no opportunity as contemplated in Order 17 (4) (*c*) of the Model Standing Orders was given to respondents 2 to 9. It is in view of this only that the Labour Court held that the order of dismissal was invalid and the workmen were entitled to reinstatement. It is the correctness of this conclusion that is challenged before us.

4. The learned counsel for the appellant contended that even though the appellant may be bound by the Model Standing Orders as a contract between the appellant and its employees, an Industrial Tribunal or Labour Court is not bound by the Model Standing Orders and its jurisdiction is wide, and consequently, even when the Labour Court comes to the conclusion that the opportunity contemplated by Order 17 (4) (*c*) of the Model Standing Orders was not given to respondents 2 to 9, it was for the Labour Court to give such an opportunity to find out whether the order of dismissal was proper or not. The Supreme Court had occasion to consider a Model Standing Order similar to the one in the present case in *M/s. Lakshmiratan Cotton Mills Co., Ltd., v. Its Workmen*[1]. After referring to Standing Order 26, Clause (*c*) which provides that where it is proposed to inflict the punishment of dismissal for any misconduct, the workman shall be given notice in writing to show cause within a specified period why the proposed punishment may not be awarded and along with such notice he shall be given a copy of the findings of the enquiring officer on the charge or charges, the Supreme Court observed as follows:

> "This clause clearly contemplates a notice to be given to the workman for the purposes of enabling him to show cause within a specified period as to why the proposed punishment of dismissal should not be inflicted on him. The notice is required to

1. 31 Fac. L.R. 31: 47 F.J.R. 350: (1975) Lab.I.C. 1204: (1975) 2 L.L.J. 174: A.I.R. 1975 S.C. 1689.

be given not as a mere idle formality; it has a meaning and a purpose. It is intended to provide an opportunity to the workman to show cause against the proposed punishment of dismissal. The workman may show that the findings of the enquiring officer are not justified on the evidence on record or that even if the findings are justified, they do not warrant the extreme penalty of dismissal from service having regard to the nature or gravity of the misconduct, the past record of the workman and any other extenuating circumstances. The notice must, therefore, give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer."

5. Having regard to these observations of the Supreme Court, it is clear that the order of dismissal passed on respondents 2 to 9 in the present case without giving an opportunity to them as contemplated in Order 17 (4) (*e*) of the Model Standing Orders is invalid and therefore the Labour Court was justified in setting aside the same.

6. However, the learned counsel for the appellant contends that the decision of the Supreme Court does not mean that the respondents 2 to 9 can be straightway reinstated and that the Labour Court must itself conduct an enquiry even with regard to the proposed punishment. For this purpose, the learned counsel relied on paragraph 11 of the same jugdment of the Supreme Court to which we have drawn attention. In that paragraph, the Supreme Court referred to its two earlier decisions in *Oriental Textile Finishing Mills, Amritsar* v. *Labour Court, Jullundur and others*[1] and *Delhi Cloth and General Mills Co., Ltd.* v. *Ludh Budh Singh*[2], and observed as follows:—

"It was for this reason that in the present case the appellant made the application dated 12th March 1973 praying that if for any reason the Industrial Tribunal was inclined to take the view that the domestic enquiry held by the appellant was improper or not according to law, the appellant should be given an opportunity to prove its case on merits and for that purpose file and prove additional documents. This was clearly a request to the Industrial Tribunal to try the issue as to the validity of the domestic enquiry as a preliminary issue and if the finding on this preliminary issue was against the appellant, to give an opportunity to the appellant to adduce evidence for the purpose of establishing that the orders of dismissal were justified. Now, the question as to what is the procedure to be followed by the Industrial Tribunal when such a request is made by the employer, came up for consideration before this Court in *Delhi Cloth & General Mills Co., Ltd.* v. *Ludh Budh Singh*[1].

6. In this case, there was no such request made by the appellant herein before the Labour Court, even assuming that on the basis of any such request, the Labour Court can take further action. In view of this, the above decision is not of any assistance to support the contention of the learned counsel for the appellant that merely on the finding that there is infraction of Order 17 (4)(*c*) of the Model Standing Orders, respondents 2 to 9 were not entitled to be reinstated. The writ appeal therefore fails and the same is dismissed. There will be no order as to costs in this appeal.

R. S. ——— *Writ appeal dismissed.*

1. (1972) 2 S.C.J. 484: (1972) 1 S.C.R. 490: A.I.R. 1972 S.C. 277.
2. (1972) 2 S.C.J. 347: (1972) 1 L.L.J. 180: (1972) 3 S.C.R. 29: A.I.R. 1972 S.C. 1031.

1. (1972) 2 S.C.J. 347: (1972) 1 L.L.J. 180 (1972) 3 S.C.R. 29: A.I.R. 1972 S.C. 1031.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, C J and Nainar Sundaram, J.*

Kuppana Chettiar and another .. *Petitioners**

v.

K. Ramachandran .. *Respondent.*

and

Nanjappa Chettiar and others .. *Petitioners*

v.

K. Subba Rao .. *Respondent.*

Tamil Nadu Cultivating Tenants, Protection Act (XXV of 1955), sections 3 (4) (a) and 6-B Cultivating Tenant—Petition for eviction by landlord — Allegation of wilful default in payment of rent—Tenant agreeing to pay the arrears of rent on or before a particular date—Joint endorsement by landlord and tenant—Order passced by the Authorised Officer in terms of the joint endorsement—Failure to deposit to result in eviction order being passed—Direction not complied with—Eviction order passed—Revision against the order—Interim stay of execution of the order of eviction asked for—Conditional order passed—Condition complied with—Effect of compliance of the conditional order.

In the instant case the Authorised Officer passed by the order of eviction under section 3 (4) (b) of the Act on the failure of the tenant to deposit the rent within the time specified by the earlier order. From this point of view, the order of the Authorised Officer is unexceptionable. As a matter of fact, the petitioners did not make any complaint against the order of the Authorised Officer on the merits. So long as the order of the Authorised Officer is unexceptionable and is not vitiated by any one of the factors enumerated in section 115 of the Code of Civil Procedure, the High Court will have no jurisdiction to interfere with that order. [*Para.* 23.]

The fact that, during the pendency of the Civil Revision Petitions the tenant applied for and obtained orders of interim stay of the execution of the order of eviction on condition of the deposit of the rent and did not deposit the rent, will not in anyway invalidate the order passed by the Authorised Officer. The question that has to be considered in respect of default is, not with reference to any date subsequent to the order of the Authorised Officer but with reference to the date fixed by him prior to his passing the order of eviction. The section itself contemplates the Revenue Divisional Officer giving an opportunity to the tenant to deposit the arrears of rent within such time as he considers just and reasonable and only if the cultivating tenant fails to deposit the same as directed, the Revenue Divisional Officer can pass an order for eviction, and in terms of an earlier order either independent or conditional. In view of this, the default contemplated by the statutory provision is one occurring and existing on the date of passing of the order for eviction by the Revenue Divisional Officer himself and not at any stage subsequent to the said order. If the cultivating tenant does not deposit the rent as directed, default has occurred and there is no question of that default being cured or wiped out by the tenant depositing the rent pursuant to any interim order of stay and any such deposit made during the pendecny of the proceedings in the High Court will be in compliance with the interim order of the High Court and can never be a deposit in compliance with the original order of the Revenue Divisional Officer. As a matter of fact, the High Court is not concerned in such proceedings with the original default committed by the cultivating tenant in payment of the rent to the landlord. It is because of this original default, the Revenue Divisional Officer directs the tenant to deposit the rent in the civil Court before a particular date and the subject-matter of the civil revision proceedings in the High Court therefore will not be the original default, but only the failure of the tenant to comply with the decision of the Revenue Divisional Officer. Once that failure is admitted the consequential order of the Revenue Divisional Officer is unexceptionable; there will be no occasion for the High Court to give an opportunity to the cultivating tenant to comply with the original direction of the Revenue Divisional Officer to deposit the amount, because the original order no longer stands and the order has worked itself out in the form of a final order of eviction, which on merits is not challenged. If the matter is understood in this manner, certainaly any deposit made by the tenant in terms of the interim order of stay passed by the Court stating the execution of the order for eviction passed by the Authorised Officer can never be tantamount to compliance with the conditional order passed by the Authorised Officer. [*Para.* 24.]

M. Vaikkaran v. *Nallathammal*, (1972) 2 M.L.J. 17, overruled.

* C.R.P. Nos. 2113 and 2142 of 1979.
6th August, 1980.

Cases referred to:—

M. Vaikkaran v. *Sellathammal*, (1972) 2 M.L.J. 17; *Rama Iyer* v. *Sundaresa Ponnapoondar*, (1966) 2 M.L.J. (S.C.) 78 : (1966) 2 S.C.J. 756 : (1966) 2 An W.R. (S.C.) 78 : (1966) 3 S.C.R. 474 : A.I.R. 1966 S.C. 1431; *Rasu Moopanar* v. *Ramamoorthy Iyer*, (1967) 1 M.L.J. 287; *Aravamudha Chettiar* v. *M. Abdul Khader Rowther*, (1952) 2 M.L.J. 492 : A.I.R. 1953 Mad. 268.

Petition under section 6-B of Tamil Nadu Cultivating Tenants, Protection Act XXV of 1955 praying the High Court to revise the order of the Authorised Officer (Land Reforms), Erode, dated 4th September, 1979 and made in C.T.P. Nos. 44 and 43 of 1978 respectively.

V. Natarajan and *A.S. Venkatachalamurthy*, for Petitioners.

K. S. Bakthavatsalam, for Respondent.

The Court (Natarajan, J.) made the following

ORDER:—The two revisions pose the same questions of law for consideration and the facts of each case are more or less identical except with reference to one matter. The petitioners in each case are cultivating tenants against whom orders of eviction have been passed by the Authorised Officer consequent on their failing to deposit the arrears of rent as ordered to be paid by them within the prescribed time. C.R.P.No. 2113 of 1979 arises out of C.T.P.No. 44 of 1978 on the file of the Authorised Officer, Erode while C.R.P. No. 2142 of 1979 arises out of C.T.P.No.43 of 1978 on the file of the same officer.

2. The respondent in C.R.P.No.2113 of 1979, who is the landlord of the revision petitioners, filed a petition for eviction against the petitioners under section 3 (4) (*a*) of the Tamil Nadu Cultivating Tenants' Protection Act (hereinafter referred to as the 'Act') on the ground that they had committed wilful default in the payment of rent for the years 1976-77 and 1977-78. The petitioners filed counter on 21st November, 1978. On 19th June, 1979, both parties made a joint endorsement and the petitioners agreed to deposit a sum of Rs. 9,000/- in full satisfaction of the rent for the two years on or before 7th August, 1979, and in default thereof, eviction could be ordered. The Authorised Officer passed orders on the joint endorsement on the next date, *i.e.*, 20th June, 1979, and directed the petitioners to deposit a sum of Rs.9,000/- on or before 7th August, 1979, and further held that the failure to deposit the amount as directed will result in an order of eviction being passed. The order was not complied with and hence the respondent filed a petition on 7th August, 1979, for an order of eviction being passed in terms of the earlier order. On 4th September, 1979, the Authorised Officer passed an order of eviction and it is the correctness and legality of that order that is challenged in this revision petition.

3. The revision was filed on 20th September, 1979, and the petitioners sought an interim order of stay of the order of eviction by means of C.M.P.No. 9536 of 1979. This Court granted interim stay on condition that the petitioners deposit a sum of Rs. 9,000 in the Court below within two weeks. This order was complied with and that has resulted in the interim stay being made absolute till the disposal of the revision.

4. As regards C.R.P.No.2142 of 1979 that was also a case where the respondent-landlord filed a petition (C.T.P. No. 43 of 1978) on 20th August, 1978, for eviction of the petitioners on the ground of wilful default in the payment of rent for the years 1976-77 and 1977-78. The petitioners filed a counter but on 26th June, 1979, a joint endorsement was made by both parties. The respondent agreed to receive a sum of Rs.3,300/- in full quit of his claim for Rs. 4,000/- and the petitioners agreed to pay the said sum. The joint endorsement, however, did not make any reference to the time within which the amount should be paid. On 29th June, 1979, the Authorised Officer passed orders on the joint endorsement and directed the petitioners to deposit a sum of Rs. 3,300/- on or before 31st July, 1979, and further stated that failure to deposit the amount will result in an order of eviction being passed. The petitioners not having deposited the amount the respondent took out an application on 7th August, 1979, for an order of eviction being passed and that application was allowed by the Authorised Officer on 4th September, 1979. It is thereafter, the petitioners have preferred C.R.P.No. 2142 of 1979 to this Court. Along with the revision, they have filed C.M.P.No. 9652 of 1979 and sought interim orders of stay. This Court granted

them interim stay subject to the condition that the petitioners should deposit a sum of Rs.3,300/- in the Court below within the two weeks. The direction was duly complied with by the petitioners and hence the order of interim stay has been made absolute till the disposal of the revision.

5. On behalf of the petitioners in these two cases it is contended that the order of eviction passed by the Authorised Officer in each case need not be considered on the merits since the petitioners are entitled to have the order set aside on another ground. According to the petitioners the revision proceedings must be treated as a continuation of the proceedings under the Act and inasmuch as the petitioners have deposited in these proceedings the amount they were directed to deposit by the Authorised Officer, it must be held that they have complied with the orders of the Authorised Officer and therefore, the orders of eviction passed against them should be set aside. In support of this contention, the learned counsel places reliance in *M. Voikkaran* v. *Sellathammal*[1]. That was also a case which arose under the Act and there too, the tenant did not deposit the rent as per the conditional order passed by the Authorised Officer and his default resulted in an order of eviction being passed against him. A revision was preferred to this Court and as in the present case, the tenant was granted interim stay subject to his depositing within the time given by Court the amount he was originally called upon to deposit by the Authorised Officer. The condition was satisfied by the tenant and the interim stay was made absolute. Eventually, when the revision came up for disposal, Gokulakrishnan, J., took the view that as against an order of the Authorised Officer. the Act does not provide for an appeal and therefore, a revision to the High Court under section 6-B of the Act must be construed to be different in nature and scope than a revision preferred under section 115 of the Code of Civil Procedure. The learned Judge was of the further view that a revision under section 6-B of the Act gives wider powers to the High Court and therefore, it can be well construed that a revision under the abovesaid provision is a continuation of the proceedings before the Authorised Officer. In that view, the learned Judge held as follows:

1. (1972) 2 M.L.J. 17.

"The High Court has ample powers in its revisional jurisdiction to afford an opportunity to the tenant in proper cases for the purposes of complying with the directions of the Revenue Court in the matter of payment of arrears of rent."

Accordingly the learned Judge held that since the tenant had paid the arrears as per opportunity given to him, albeit in the revision proceedings, he is absolved of the default and therefore, he is entitled to have the order of eviction set aside. For reaching such a conclusion the learned Judge has relied upon the judgment of Ramanujam, J., in *Venkatachala Padayachi* v. *Rajammal*[1], besides relying upon *Rama Iyer* v. *Sundaresa Ponnapoondar*[2] and *Rasu Moopanar* v. *Ramamurthy Iyer*[3], for determining the scope of the revision petition filed under section 6-B of the Act. As regards the judgment of Ramanujam, J., in *Venkatachala Padayachi* v. *Rajammal*[1], no reasons have been given by the learned Judge for taking the view that the payment of arrears of rent during the pendency of revision proceedings before the High Court would be tantamount to deposit of rent within the time given to him by the Revenue Court.

6. The learned counsel for the landlord respondent, however, places reliance on the judgment of Mohan, J., in *Sivasankara Devarayar* v. *Prakash (Minor) and another*[4], wherein also a tenant sought to contend that an order of eviction passed against him by the Authorised Officer for his failure to deposit the arrears of rent within the time granted to him should be set aside solely on the ground that he had paid the rent subsequently when the revision preferred by him it to this Court was pending consideration. Mohan, J., has considered the ratio contained in *M. Voikkaran* v. *Sellathammal*[5] and expressed his inability to share the view taken by Gokulakrishnan, J., in the abovesaid case. After referring to the relevant portion in *M. Voikkaran* v. *Sellathammal*[5], where this question has been dealt with, the learned Judge has stated as follows:

1. C.R.P. No. 1156 of 1970 Order dated 25-2-1971.
2. (1966) 2 M.L.J. (S.C.) 78: (1966) 2 S.C.J. 576: (1966) 2 An.W.R. (S.C.) 78: (1966) 3 S.C.R. 474: A.I.R. 1966 S.C. 1431.
3. (1967) 1 M.L.J. 287.
4. C.R.P. Nos. 991 and 992 of 1979 Order dated 29-6-1979.
5. (1972) 2 M.L.J. 17.

"First of all I have my grave doubt as to whether a revision could be considered to be a continuation of the proceedings under the Madras Cultivating Tenants' Protection Act initiated before the Revenue Court.............................. The Revenue Court as in the instant case is not a civil Court. The question whether it is a continuation of proceedings cannot arise at all. Even otherwise, the question may be raised. What happens to a revision under Article 227 of the Constitution? It is an independent one. Under such circumstances could it be said that it is the continuation of proceedings of the Court below. The answer should be in the negative. The whole question in my view as rightly contended by Mr. Srinivasan is whether there was any justification for the petitioner not to comply with the orders of the Revenue Court to pay the arrears on or before 26th February, 1979. If there is no justification, the orders of eviction must be upheld. The fact that he complied with the interim orders of this Court is no ground to hold in my considered *view that orders of the Revenue Court* had been complied with". (Italics supplied)

7. Thus it may be seen that an uniform view has not been taken on the question whether a tenant, against whom an order of eviction has been passed for his failure to deposit the arrears of rent within the time given to him by the Authorised Officer, can seek condonation of his default by remitting the amount later, as per the directions given to him by this Court in revision proceedings pending before it. In order to set at rest the controversy effectively and also to resolve the conflicting views taken in *M. Voikkaran* v. *Sellathammal*[1] and *Sivasankara Devarayar* v. *Prakash (Minor) and another*[2]. I think it is necessary that these two revisions should be heard and disposed of by a Division Bench. The questions which need determination are:—

"(1) Whether a revision preferred to this Court under section 6-B of the Tamil Nadu Cultivating Tenants' Protection Act will amount to a continuation of proceedings initiated before the Revenue Court as known and understood in law?

(2) Whether a payment of arrears of rent in compliance with an order of this Court during the pendency of the revision proceedings will be tantamount to compliance of a conditional order passed by an Authorised Officer? and

(3) Whether payment of arrears of rent for obtaining an order of stay of eviction during the pendency of the revision proceedings can be treated as payment made in compliance with the original conditional order passed by an Authorised Officer?"

8. I therefore direct the papers to be placed before My Lord the Chief Justice for orders regarding the petitions being referred to a Bench for decision.

Pursuant to the order dated 11th January, 1980 of Natarajan, J. and made herein, these petitions coming on for hearing on Tuesday the fifth day of August, 1980 and this day upon perusing these petitions, the orders of the Authority and the records in these cases and upon hearing the arguments *M. R. Narayanaswami* for *V. Natarajan* and *V. Nicholas*, Advocates, for Petitioners (In C.R.P. No. 2113 of 1979). *T. Somasundaram* and *A. S. Venkatachalamurthy*, Advocates for Petitioners (In C.R.P. No. 2142 of 1979).
Srinivasan for *V. R. Venkataraman*, *M. K. Kabir* and *V. R. Karthikeyan*, for Respondent in both the Petitions.

The Order of the Court was made by

Ismail, CJ.:— These two civil revision petitions, whose facts are similar, have come up before us on a reference made by Natarajan, J., in view of the conflict between the decision of Gokulakrishnan, J., in *Mahalinga Voikkaran* v. *Sellathammal*[1] and that of Mohan, J. in *Sivasankara Devarayar* v. *Prakash (Minor) and another*[2]. The petitioners in each of these cases are cultivating tenants against whom orders of eviction have been passed by the Authorised Officer consequent on their failure to deposit the arrears of rent as ordered to be paid by them within the stipulated time. C.R.P. No. 2113 of 1979 arises out of C.T.P. No. 44 of 1978 on the file of the Authorised Officer, Erode, while C.R.P. No. 2142 of 1979 arises out of C.T.P. No. 43 of 1978 on the file of the officer.

1. (1972) 2 M.L.J. 17.
2. C.R.P. Nos. 991 and 992 of 1979, Order dated 29-6-1979.

1. (1972) 2 M.L.J. 17.
2. C.R.P. Nos. 991 and 992 of 1979, Order dated 29th June, 1979.

11. The respondent in C.R.P.No. 2113 of 1979, who is the landlord, filed the petition for eviction of the petitioners under section 3(4)(*a*) of the Tamil Nadu Cultivating Tenants, Protection Act, 1955 (hereinafter referred to as the Act), on the ground that they had committed wilful default in the payment of rent for the years 1976-77 and 1977-78. The petitioners filed a counter on 21st November, 1978. On 19th June, 1979, both the parties made a joint endorsement and the petitioners agreed to deposit a sum of Rs. 9,000 in full satisfaction of the rent for the two years, on or before 7th August, 1979, and that in default thereof eviction could be ordered. The Authorised Officer passed orders in terms of the joint endorsement on the next day, *i.e.*, 20th June, 1979, and directed the petitioners to deposit a sum of Rs. 9,000 on or before 7th August, 1979, and further held that failure to deposit the amount as directed would result in an order of eviction being passed. The direction was not complied with and hence the respondent-landlord filed a petition on 7th August, 1979, for an order of eviction being passed in terms of the earlier order dated 20th June, 1979. On 4th September, 1979, the Authorised Officer passed an order of eviction, and it is against that order C.R.P No. 2113 of 1979 was filed before this Court. The said revision petition was filed on 20th September, 1979 and the petitioners sought an interim stay of the execution of the order of eviction in C.M.P.No.9536 of 1979. This Court granted an order of interim stay of the execution of the order of eviction on condition that the petitioners deposited the sum of Rs.9,000 in the Court below within two weeks. This order was complied with and this resulted in the order of interim stay being made absolute till the disposal of the civil revision petition.

12. The facts in C.R.P.No.2142 of 1979 are practically similar.

13. In that case the landlord filed the petition for eviction of the petitioners herein on the ground of wilful default, in the payment of rent for the years 1976-77 and 1977-78. The petitioners filed a counter, but on 26th June, 1979, a joint endorsement was made by both the parties, and the respondent agreed to receive a sum of Rs. 3,300 in full quit of his claim for Rs. 4,000 and the petitioners agreed to pay the said sum. The joint endorsement did not, however, make any reference to the time within which the amount should be paid. On 29th June, 1979, the Authorised Officer passed orders on the basis of the joint endorsement and directed the petitioners to deposit the sum of Rs.3,300 on or before 31st July, 1979, and further stated that failure to deposit the amount would result in an order of eviction being passed. The petitioners not having deposited the amount as directed, the respondent took out an application on 7th August, 1979, for an order of eviction being passed and that application was allowed by the Authorised Officer on 4th September, 1979. It was against this order that the petitioners filed C.R.P.No.2142 of 1979 on the file of this Court. Along with the civil revision petition, they filed C.R.P.No. 9652 of 1979 and sought interim stay of the execution of the order of eviction. This Court granted interim stay on condition that the petitioners deposited the sum of Rs.3,300 in the Court below within two weeks. That direction was duly complied with and hence the order of interim stay has been made absolute till the disposal of the civil revision petition.

14. When the civil revision petition came up for disposal before Natarajan, J., on behalf of the petitioners in these two civil revision petitions it was contended that the order of eviction passed by the Authorised Officer in each of these cases need not be considered on merits, since the petitioners were entitled to have the order set aside on another ground. According to the petitioners, the revision proceedings must be treated as a continuation of the proceedings under the Act, that inasmuch as the petitioners have deposited in these proceedings the amount that they were directed to deposit, by the Authorised Officer, it must be held that they have complied with the orders of the Authorised Officer and that therefore the order of eviction passed against them should be set aside. In support of this contention they relied on the decision of Gokulakrishnan, J., referred to above namely, *Mahalinga Voikkaran* v. *Sellathammal*[1]. The learned counsel for the respondents, on the other hand, relied on a judgment of Mohan, J. in *Sivasankara Devarayar* v. *Prakash* (*Minor*) *and another*[2]. It was

1. (1972) 2 M.L.J. 17.
2. C.R.P. Nos. 991 and 992 of 1979, Order dated 29th June, 1979.

against this set up that the learned Judge referred to the observations contained in the judgment of both the learned Judges and pointed out that there was a conflict, and observed:

> "Thus it may be seen that an uniform view has not been taken on the question whether a tenant, against whom an order of eviction has been passed for his failure to deposit the arrears of rent within the time given to him by the Authorised Officer can seek condonation of his default by remitting the amount later on, as per the directions given to him by this Court in revision proceedings pending before it. In order to set at rest the controversy effectively and also to resolve the conflicting views taken in *M.Voikkaran* v. *Sellathammal*[1] and *Sivasankara Devarayar* v. *Prakash (Minor) and another*[2]. I think it is necessary that these two revisions should be heard and disposed of by a Division Bench. The questions which need determination are:
>
> 1. Whether a revision preferred to this Court under section 6-B of the Tamil Nadu Cultivating Tenants, Protection Act will amount to a continuation of proceedings initiated before the Revenue Court as known and understood in law?
>
> 2. Whether a payment of arrears of rent in compliance with an order of this Court during the pendency of the revision proceedings will be tantamount to compliance of a conditional order passed by an Authorised Officer? and
>
> 3. Whether payment of arrears of rent for obtaining an order of stay of eviction during the pendency of the revision proceedings can be treated as payment made in compliance with the original conditional order passed by an Authorised Officer?
>
> I therefore direct the papers to be placed before my Lord the Chief Justice for orders regarding the petitions being referred to a Bench for decision."

15. Thus it will be seen that it is not merely the three questions extracted above that have been referred to the Bench for decision, but the entire civil revision petitions themselves have been posted before the Bench for disposal. Consequently for the purpose of understanding the conflict referred to by the learned Judge, and the questions extracted above, it is necessary to refer to the decision of Gokulakrishnan, J., as well as that of Mohan, J. The decision of Gokulakrishnan, J., as already pointed out, is *Mahalinga Voikkaran* v. *Sellathammal*[1]. In that case the landlord filed apetition under section 3 (4) (*a*) of the Act before the Revenue Court, Thanjavur, for eviction of the tenant from the petition-mentioned land alleging that the tenant had defaulted in the payment of rent due to him for fasli 1379. On 31st October, 1970, the Revenue Court passed a preliminary order directing the tenant to pay the admitted arrears of rent of Rs.214-40 on or before 20th November, 1970; the same order mentioned that in the event of default an order of eviction would follow. The Presiding Officer of the Revenue Court, who passed the said order, did not continue, and there was a vacancy in the post during the months of November and December, 1970. Later, when the post was filled up by a new officer, the case came up for hearing on 2nd Mach, 1971. On that day, it was stated, the counsel for the tenant and the counsel for the landlord were present and on the learned counsel making an endorsement to the effect that the tenant had not paid the arrears, the Revenue Court ordered eviction of the tenant. It was against that order the tenant preferred the civil revision petition. In that case also, during the pendency of the civil revision petition, there was a petition to stay the execution of the order of eviction, and this Court passed an order of interim stay conditional upon the tenant paying the arrears due. The tenant complied with that direction and thereafter the order of interim stay was made absolute. It was with reference to these interim orders that the argument that was advanced before the learned Judge on behalf of the petitioner was that as per the interlocutory order passed in the civil revision petition the tenant had paid the arrears due and that as such this Court could excuse the delay in the payment of the arrears due to the landlord and thereby allow the revision petition. In support of this contention the learned counsel for the

1. (1972) 2 M L.J. 17.
2. C.R.P. Nos. 991 and 992 of 1979, Order dated 29th June, 1979.

1. (1972) 2 M.L.J. 17.

tenant relied on the decision of Ramanujam, J., in *Venkatachala Padayachi* v. *Rajammal*[1]. It is admitted that the learned Judge had simply observed in that case that, in view of the payment of the entirety of his liability towards arrears of rent fixed by the Revenue Court, there could not be any eviction of the petitioner from the leasehold lands 'in view of the provisions of section 3 of the Act'. Reliance was also placed before the learned Judge on the judgment of the Supreme Court in *Rama Iyer* v. *Sundaresa Ponnapoondar*[2] and a judgment of this Court (Alagiriswami, J.) in *Rasu Moopanar* v. *Ramamurthy Iyer*[3] and *Aravamudha Chettiar* v. *M. Abdul Khader Rowther*[4].

16. After referring to these decisions and the decision cited on behalf of the respondent-landlord, the learned Judge observed as follows:—

"As for as the present case is concerned it is not only the cause of justice, but the powers of the High Court, when it exercises its revisional jurisdiction conferred upon it under section 6-B of the Madras Cultivating Tenants Protection Act, read with section 116, Civil Procedure Code, are involved.

It is clear from the decision reported in *Rama Iyer* v. *Sundaresa Ponnapoondar*[2] and *Aravamudha Chettiar* v. *M. Abdul Khader Rowther*[4], that the revisional powers of the High Court are wide enough to uphold the spirit of legislative enactments when dealing with cases under such enactments in revision.

While the revision petition was pending, the tenant has paid the arrears as per the interlocutory order of this Court. As on date, it cannot be considered that there is any default on the part of the petitioner in the matter of payment of rent. Considering that 'revision' is a continuation of the proceedings under the Madras Cultivating Tenants Protection Act initiated before the Revenue Court, I am of the opinion that the High Court has ample powers in its revisional jurisdiction to afford an opportunity to the tenant in proper cases for the purpose of complying with the directions of the Revenue Court in the matter of payment of arrears of rent. In this case, the tenant was given an opportunity to pay the arrears during the pendency of this revision proceedings. In view of the fact that the tenant has complied with such direction, I do not find there is any question of 'default' in this case to entitle the landlord to evict the tenant."

1. C.R.P. No. 1156 of 1970.
2. (1966) 2 M.L.J. (S.C.) 78: (1966) 2 S.C.J. 576: (1966) 2 An.W.R. (S.C.) 78 : (1966) 3 S.C.R. 474: A.I.R. 1966 S.C. 1431.
3. (1967) 1 M.L.J. 287.
4. (1952) 2 M.L.J. 492: A.I.R. 1953 Mad. 268.

17. With reference to this judgment of Gokulakrishnan, J., Mohan, J., stated:—

"First of all I have my grave doubt as to whether a revision could be considered to be a continuation of the proceedings under the Madras Cultivating Tenants, Protection Act initiated before the Revenue Court. The learned Judge relied upon a decision of Govinda Menon, J., in *Aravamudha Chettiar* v. *M. Abdul Kader Rowther*[1], to lay down this proposition, but I find therein what the learned Judge held was as extracted below:—

'During the pendency of an appeal against an order made by the Rent Controller for eviction as a result of non-payment of rent, it is open to the appellate Court to condone the delay. An appeal is continuation of the proceedings in the Court of first instance and the appellate Tribunal can condone the default for non-payment of rent'.

That decision relates only to an appeal and not to a revision. The Revenue Court as in the instant case is not a civil Court. The question whether it is continuation of proceedings cannot arise at all. Even otherwise one question may be raised. What happens to a revision under Article 227 of the Constitution? It is an independent one. Under such circumstances, could it be said that it is the continuation of proceedings of the Court below? The answer should be in the negative. The whole question in my view, as rightly contended by Mr. Srinivasan is whether there

1. (1952) 2 M.L.J. 492: A.I.R. 1953 Mad. 268.

was any justification for the petitioner not to comply with the orders of the Revenue Court to pay the arrears on or before 26th February, 1979. If there is no justification the orders of eviction must be upheld. The fact that he complied with the interim orders of this Court is no ground to hold in my considered view *that the orders of the Revenue Court* had been complied with".
(Italics supplied).

18. We are of the opinion that the decision of Gokulakrishnan, J., calls for one or two comments. In the first place the decisions in *Rama Iyer* v. *Sundaresa Ponnapoondar*[1] and *Aravamudha Chettiar* v. *M. Abdul Khader Rowther*[2], did not hold that the revisional powers of the High Court were wide enough to uphold the spirit of the legislative enactments when dealing with cases under such enactments in revision. As a matter of fact, the decision of the Supreme Court in *Rama Iyer* v. *Sundaresa Ponnapoondar*[1], dealt with a different situation altogether. That was a case which arose under the Madras Cultivating Tenants, Protection Act, 1955, and an application was filed for a declaration that the amount deposited by the respondent therein represented the correct amount of rent due from him. There was a controversy whether the respondent was a cultivating tenant at all. The Revenue Court held that the respondent was not a cultivating tenant of the appellant and could not claim the benefit of section 3 (3) of the Act and dismissed the application. The respondent filed a petition in revision before the High Court under section 6-B of the Act read with section 115 of the Code of Civil Procedure. The High Court came to the conclusion that the respondent was a cultivating tenant of the appellant and therefore allowed the revision petition and declared that the amount deposited by the respondent represented the correct amount due from him to the appellant. In the appeal before the Supreme Court the question that was argued was that the finding of the Revenue Court that the respondent was not a cultivating tenant was a finding of fact and that the High Court had no jurisdiction to set it aside on revision. It was that contention which was considered by the Supreme Court. The Supreme Court considered the provisions of section 6-B of the Act and section 115 of the Code of Civil Procedure and observed:

"In the present case, no question of revision under sub-section (*c*) of section 115 arises and we are concerned only with the power of revision under sub-sections (*a*) and (*b*) of section 115. Sub-section (*a*) empowers the High Court to correct an erroneous assumption of jurisdiction; sub-section (*b*) empowers the High Court to correct an erroneous assumption of jurisdiction; sub-section (*b*) empowers it to correct an erroneous refusal of jurisdiction. The decision of the Subordinate on all questions of law and fact, not touching its jurisdiction is final and,............ however erroneous such a decision may be, it is not revisable under sub-sections (*a*) and (*b*) of section 115. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, *e.g.*, on a preliminary fact upon the existence of which its jurisdiction depends, the subordinate Court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court, in its revisional jurisdiction under sub-sections (*a*) and (*b*) of section 115. The question is on which side of of the line the present case lies, and whether the decision of the Revenue Divisional Officer that the respondent is not a cultivating tenant of the appellant is subject to review by the High Court in its revisional jurisdiction. The Revenue Divisional Officer is an inferior Court of limited jurisdiction functioning under the Madras Cultivating Tenants' Protection Act 1955. To ascertain the limit and extent of its jurisdiction, we must examine the provisions of the Act".

After having made the above observations in paragraph 4 of the judgment, the Supreme Court referred to the provisions of the Act in paragraph 5, and observed in paragraph 6:

"The Act gives generous protection to cultivating tenants from eviction, and severely restricts the right of landlords to resume possession of their lands from their cultivating tenants. In case of disputes between the landlord and the

1. (1966) 2 M.L.J. (S.C.) 78 : (1966) 2 An.W.R. (S.C.) 78: (1966) 2 S.C.J. 576 : (1966) 3 S.C.R. 474: A.I.R. 1966 S.C. 1431.
2. (1952) 2 M.L.J 492: A.I.R. 1953 Mad. 268.

cultivating tenant, the Revenue Divisional Officer is authorised to entertain and decide applications by the landlord for eviction and resumption and possession and by the cultivating tenant for restoration of possession and to impose penalties on the landlord or the tenant for infraction of section 4-B. To attract the jurisdiction of the Revenue Divisional Officer, there must be a dispute between a landlord and cultivating tenant. The existence of the relation of landlord and cultivating tenant between the contending parties is the essential condition for the assumption of jurisdiction by the Revenue Divisional Officer in all proceedings under the Act. The Tribunal can exercise its jurisdiction under the Act only if such relationship exists. If the jurisdiction of the Tribunal is challenged, it must enquire into the existence of the preliminary fact and decide if it has jurisdiction. But its decision on the existence of this preliminary fact is not final; such a decision is subject to review by the High Court in its revisional jurisdiction under section 6-B. The enquiry by the Tribunal is summary, there is no provision for appeal from its decision, and the Legislature could not have intended that its decision on this preliminary fact involving a question of title would be final and not subject to the overriding powers of revision by the High Court."

19. Thus it is clear that the Supreme Court decided the case only with in the four corners of section 115 of the Code of Civil Procedure, and pointed out that any finding of an inferior Tribunal whether on facts or on law, touching its jurisdiction, would be subject to review by the High Court, because a finding one way or the other would have enabled the Tribunal either to assume jurisdiction or to refuse to exercise jurisdiction, and consequently attracting clause (*a*) or (*b*) of section 115 of the Code of Civil Procedure. We are of the opinion that beyond that the Supreme Court did not lay down anything further.

20. In *Aravamudha Chettiar* v. *M. Adbul Khader Rowther*[1], the only passage relied on by the learned Judge (Gokulakrishnan, J.) is:

"During the pendency of an appeal against an order made by the Rent Controller for eviction as a result of non-payment of rent, it is open to the appellate Court to condone the delay. An appeal is a continuation of the proceedings in the Court of first instance and the appellate Tribunal can condone the default for non-payment of rent".

It is not possible to draw a general inference from the above observations, because they refer to the condonation of delay and also condonation of default for non-payment of rent. In what situation those observations were made has not been made clear in the judgment of Gokulakrishnan, J., himself. Under these circumstances, we have necessarilly to fall back upon the provisions of the Cultivating Tenants, Protection Act as well as section 115 of the Code of Civil Procedure.

21. The relevant provision of the Tamil Nadu Cultivating Tenants, Protection Act, 1955, is section 3 (4). That provision reads as follows:—

"*Section* 3 (4). Every landlord seeking to evict a cultivating tenant falling under sub-section (2) shall, whether or not there is an order or decree of a Court for the eviction of such cultivating tenant, make an application to the Revenue Divisional Officer and such application shall bear a court-fee stamp of one rupee.

(*b*) On receipt of such application, the Revenue Divisional Officer shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it and in a case falling under clause (*a*) or clause (*aa*) of sub-section (2), in which the tenant had not availed of the provisions contained in sub-section (3) the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable, having regard to the relative circumstances of the landlord and the cultivating tenant for depositing arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section

1. (1952) 2 M.L.J. 492: A.I.R. 1953 Mad. 268.

(3) (b). If the cultivating ten nt fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction:

Provided that the Revenue Divisional Officer shall not direct the cultivating tenant to deposit such arrears of rent as have become time-barred under any law of limitation for the time being in force."

Section 6-B which refers to section 115 of the Code of Civil Procedure, reads as follows:—

"The Revenue Divisional Officer shall be deemed to be a Court subordinate to the High Court for the purposes of section 115 of the Code of Civil Procedure, 1908 (Central Act V of 1908), and his orders shall be liable to revision by the High Court under the provisions of that section."

A reading of these provisions will clearly show that under section 3 (4) (b) of the Act, once a cultivating tenant has failed to comply with the direction to deposit the rent into the Revenue Court within the time given by the Revenue Divisional Officer, the Revenue Divisional Officer has no option but to pass an order for eviction. If, for any reason, the tenant was not able to deposit the rent within the given time, certainly he should have approached the Revenue Divisional Officer for extension of time, and, if he unreasonably refused to extend the time, the tenant may then have a grievance with respect thereto. But once a date has been fixed for the deposit of the rent, and within the time the amount has not been paid and there has been no application for extension of time by the tenant before the Revenue Divisional Officer, the Revenue Divisional Officer is under an obligation to pass an order for eviction, because, in such a situation, section 3 (4) (b) says that "the Revenue Divisional Officer shall pass an order for eviction". When the Revenue Divisional Officer has passed such an order for eviction, and a revision petition is preferred to this Court against that order, this Court can only examine whether the Revene Divisional Officer has committed any error of jurisdiction so as to attract either clause (a) or clause (b) or clause (c) of section 115 of the Code of Civil Procedure. In this particular case before us, there is no contention that any one of these clauses is attracted with reference to the order of the Authorised Officer. As a matter of fact, in neither of the judgments, namely, in the judgment of Gokulakrishnan, J., or the judgment of Mohan, J., this question had been approached from the point of view of the scope of the jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

22. Gokulakrishnan, J., would appear to have proceeded on the basis that, since revision proceedings are a continuation of the original proceedings initiated before the Revenue Court, this Court will have power to extend the time for making the deposit. It was only with reference to this aspect, that question No. 1 in the order of Natarajan, J., has been framed. We are of the opinion that the question, whether a particular proceeding pending before the High Court is a continuation of the original proceedings or not, is not decisive of the matter in this case. In one sense a revision or appeal preferred to this Court can be said to be a continuation of the original proceedings, because a revision is preferred against the order passed in the original proceedings just as an appeal is preferred against the judgment and decree passed in the original proceedings. But that certainly will not help to decide the question of the scope of the power of the High Court as a revisional Court or appellate Court. It may be that the High Court exercises its revisional jurisdiction only because of its general status as a superior Court having appeallate jurisdiction over the subordinate Courts. But that does not equate the scope of the appellate power of the High Court. The power which the High Court can exercise has to be found within the four corners of the statutory provisions under which the jurisdiction of the High Court has been invoked. When the jurisdiction of the High Court has been invoked under section 115 of the Code of Civil Procedure, the exercise of its power by the High Court is certainly in terms of section 115 itself. When the High Court exercises its appellate power, a mere disagreement with the trial Court on the appreciation of evidence or findings of fact is sufficient to clothe the appellate Court with the right to interfere with the judgment and decree of the trial Court. On the other hand, when the High Court exercises its revisional power under section 115 of the Code of Civil Procedure, a mere disagreement with the appreciation of evidence or findings of fact

of the trial Court will not be sufficient to enable it to interfere with the order of the trial Court and it has to further find whether the order of the trial Court comes within the scope of that section or not; only if the order of the trial Court is vitiated by errors of jurisdiction enumerated in that section, the revisional Court will have the power to interfere with that order and not otherwise. In view of this, in these cases the High Court will have to first find out whether the orders of the Revenue Divisional Officer suffer from any of the vitiating factors mentioned in section 115 of the Code of Civil Procedure, and if they do not so suffer, the High Court cannot interfere with those orders and consequently any interim order that might have been passed by the High Court will not have the effect of destroying or negativing the orders passed by the Revenue Divisional Officer. Therefore, it may not be strictly necessary for the purpose of disposal of these cases to consider whether the revisional jurisdiction exercised by the High Court under section 6-B of the Act read with section 115 of the Code of Civil Procedure, is a continuation of the proceedings initiated before the Authorised Officer, because even assuming that it is a continuation of those proceedings, still the High Court cannot exercise its powers outside section 115 of the Code of Civil Procedure.

23. In this case, from what we have pointed out already, it will be seen that the Authorised Officer passed the order under section 3(4)(*b*) of the Act on the failure of the tenant to deposit the rent within the time stipulated by the earlier order. From this point of view, the order of the Authorised Officer is unexceptionable. As a matter of fact, the petitioners did not make any complaint against the order of the Authorised Officer on the merits. So long as the order of the Authorised Officer is unexceptionable and is not vitiated by any one of the factors enumerated in section 115 of the Code of Civil Procedure, this Court will have no jurisdiction to interfere with that order.

24. The fact that during the pendency of the civil revision petitions the tenants applied for and obtained orders of interim stay of the execution of the order of eviction on condition of the deposit of the rent and did deposit the rent, will not in any way invalidate the order passed by the Authorised Officer. From this point of view, we are unable to agree with the observation of Gokulakrishnan, J.:

> "As on date, it cannot be considered that there is any default on the part of the petitioner in the matter of payment of rent".

The question that has to be considered in respect of the default is, not with reference to any date subsequent to the order of the Authorised Officer, but with reference to the date fixed by the Officer prior to his passing the order for eviction. The section itself contemplates the Revenue Divisional Officer giving an opportunity to the tenant to deposit the arrears of rent within such time as he considers just and reasonable and only if the cultivating tenant fails to deposit the same as directed, the Revenue Divisional Officer can pass an order for eviction. Consequently, the default in such cases must have occurred prior to the Revenue Divisional Officer passing an order for eviction and in terms of an earlier order either independent or conditional. In view of this, the default contemplated by the statutory provision is one occurring and existing on the date of the passing of the order for eviction by the Revenue Divisional Officer himself and not at any stage subsequent to the said order. If the cultivating tenant does not deposit the rent as directed, default has occurred and there is no question of that default being cured or wiped out by the tenant depositing the rent pursuant to any interim order of this Court during the pendency of the proceedings in the High Court pursuant to an interim order of the High Court will be one in compliance with the interim order of the High Court and can never be a deposit in compliance with the original order of the Revenue Divisional Officer. As a matter of fact, the High Court is not concerned in such proceedings with the original default committed by the cultivating tenant in payment of the rent to the landlord. It is because of original default, the Revenue Divisional Officer directs the tenant to deposit the rent into the Court before a particular date and the subject-matter of the civil revision proceedings in the High Court therefore will not be the original default, but only the failure of the tenant to comply with the direction of the Divisional Officer. Once that failure is admitted and the consequential order of the Revenue Divisional Officer is unexceptionable, there will be no occasion for the

High Court to give an opportunity to the cultivating tenant to comply with the original direction of the Revenue Divisional Officer to deposit the amount, because the original direction no longer stands and that direction has worked itself out in the form of the final order for eviction, which, on merits, is not challenged. If the matter is understood in this manner, certainly any deposit made by the tenant in terms of the interim order of stay passed by this Court staying the execution of the order for eviction passed by the Authorised Officer can never be tantamount to compliance with the conditional order passed by the Authorised Officer.

25. We make it clear that, if the tenants had applied to the Authorised Officer for extension of time for the payment of the rent (in the present cases in C.R.P. No. 2113 of 1979 that question will not arise because even the date for payment of arrears of rent had been agreed to between the parties under a joint endorsement and the order has been passed by the Revenue Divisional Officer only in terms of the said joint endorsement and the Revenue Divisional Officer himself may not have power to extend the time for payment except with the consent of the respondents), and the Authorised Officer had declined, and the tenants had complained against such order, this Court may, in proper cases, have power to interfere with the order complained against, and extend the time for payment; that is far different from saying that the payment made pursuant to a conditional order of interim stay passed by this Court will be payment made in compliance with the directions already given by the Authorised Officer before he passed the final order for eviction against the petitioners herein, though such payment may be taken into account in cases indicated by us above, namely, where the tenant approaches the High Court complaining that the Revenue Divisional Officer has unreasonably or illegally declined to extend the time applied for by him for the deposit of the amount.

26. Under these circumstances, we are clearly of the opinion that the orders passed by the Authorised Officer in these cases, which are admittedly in accordance with the provisions of section 3 (4) (*b*) of the Act, cannot be interfered with by the High Court under section 115 of the Code of Civil Procedure. The revision petitions accordingly fail and they are dismissed. There will be no order as to costs.

R.S. —— *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

Palaniammal .. *Petitioner**

v.

Pallipalayam Jamia Masjid Muthavalli S.M. Dawood, Pallipalayam, Tiruchengode Tk., Salem District and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 39 and section 151—Scope of inherent power—Decree for possession—Direction by High Court to order delivery of possession—Subsequent suit in Sub-Court for injunction — Petition for interim injunction restraining decree-holder from executing the decree — If Court can grant injunction under inherent jurisdiction.

The power of grant of injunction is an inherent power, which is not limited to what is prescribed under Order 39, Civil Procedure Code. The inherent power cannot be invoked to the extent of preventing another civil Court from proceeding with a matter on its file, unless it is subject to the appellate or revisional jurisdiction of the other Court. [*Para.* 11.]

Before issue of *ad interim* injunction, there is always a bounden duty on the part of the Court to apply its mind to find out the nature of relief asked for and under what circumstances the party seeks its aid. It cannot in a bind-folded manner issue orders of *ad interim* injunction what would in effect result in the party to the proceedings in another Court committing contempt of the Court which issued the injunction. Therefore unless a party invoking inherent jurisdiction satisfies the Court about the need for *ad interim* injunction against a party pre-

* C.R.P. No. 593 of 1979. 11th October, 1979.

venting him from prosecuting the proceedings, which he is legally entitled to institute, the order of interim injunction will be an improper one. [*Para.* 11.]

Even while exercising the inherent power, the Court is bound to find out whether the expediency of the matter calls for an *ex parte* order of *ad interim* injunction being passed or whether the purpose cannot be achieved by first issuing notice to the party, and thereafter pass necessary orders on the injunction petition. [*Para.* 15.]

Where the Sub-Court had been apprised of execution being taken and relief was asked only against the party preventing him from further proceeding with the execution proceedings and when both Courts were situate in the same building it was unthinkable that the Sub-Court should pass *ad interim* injunction without first issuing notice particularly when it was exercising its inherent powers which should be exercised only in exceptional circumstances. [*Para.* 15.]

Whenever an injunction has to be issue against a party preventing him from participating in lawfully instituted proceedings in another civil Court, it should be done first by issue of notice and only later on the Court after hearing both the parties pass suitable orders which would not interfere with proceedings in another Court. This procedure would enable it to become aware of the nature of the proceedings instituted and, if at all it is to injunct a party to participate in lawfully instituted proceedings, it can be done only after satisfying the Court that exceptional circumstances necessitate relief to be granted to him which may be for the purposes of avoiding multiplicity of proceedings or to prevent injustice being caused. Except the appellate or revisional Court no civil Court can pass an order of *ad interim* injunction which to its knowledge would result in a person being proceeded against for disobeying such an order merely because that person is participating and proceeding with the proceedings in another Court which is lawfully exercising its powers. For participation in lawful proceedings no Court can hold such person as a wrongdoer. Hence before exercising the inherent power, instead of expecting the other Court to be prudent in not proceeding with proceedings the Court, wherein the injunction petition is filed, alone should act with restraint or prudence so as to avoid emborrassment to both the Courts. After all it can afterwards give necessary reliefs for whatever harm, if any, is occasioned by the orders of the other Court before which the party is bound to appear. Existence of power does not necessarily mean exercise of it without prudence and without precautions being taken. [*Para.* 16.]

Cases referred to:—

Bahadur Singh v. *A.H.Forbes*, A.I.R. 1922 Patna 382 ; *Milton and Company* v. *Ojha Automobile Co.*, A.I.R.1931. Cal 279; *Umapati* v. *Subodh Chandra*, A.I.R. 1953 Cal. 377; *Shoe Nandan Prasad* v. *Sheo Parsan Pathak*, A.I.R. 1942 Pat. 349; *Manohar Lal* v. *Seth Hiralal*, A.I.R. 1962 S.C.527; *Cohen* v. *Rothfield*, (1919) 1 K.B. 410; *Mangal Achi* v. *V. S. Asoka*, (1973) 1 M.L.J. 128 : 86 L.W. 449: A.I.R. 1973 Mad. 258; *Soosai Odayar* v *R. Swaminatha Aiyer*, (1936) 71 M.L.J. 227: 44 L.W. 334 : A.I.R. 1936 Mad. 522.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Additional District Munsif, Sankari at Salem, dated 24th February, 1979 and made in R.E.P. No. 279 of 1978 in O.S. No 543 of 1964.

T.S. Subramaniam, for Petitioner.

The Court delivered the following

JUDGMENT.—Judgment-debtor who was the first respondent in the Court below is the petitioner herein. First respondent herein as the decree-holder filed R.E.P.No.279 of 1978 in O.S. No 543 of 1964 on the file of the Additional District Munsif of Sankari at Salem, under Order 21, rule 35, Civil Procedure Code, for delivery of the petition-mentioned immovable property to the petitioner stating that he had obtained a decree on 4th April, 1968 for possession of immovable property but he was not able to take possession all along in view of the pendency of proceedings in Appellate Courts. The first respondent, who is the petitioner herein, and the second respondent contended that whatever be the decree that had been obtained 10 years back, since the

decree-holder has no title to the suit property, he cannot recover possession of the property, that the defendants had been under the wrong impression of the ownership of the decree-holder and now only they realise that they have paid rents for the site wrongly and now that the Government had given house site pattas under the gereral law as well as under Kudiyiruppu Acts, the defendants are not liable to abide by the decree in O.S.No. 543 of 1964 and that by virtue of the patta granted by the Government, they have become owners of the suit site as well. As for superstructure, it was put up only by the defendants, and therefore for all these reasons, the execution petition deserves to be dismissed.

2. It appears that the petitioner herein filed a petition to reopen the matter on 19th February, 1979 and at that time the orders passed by the Sub-Court, Salem in I.A.No.172 of 1979 in O.S.No.231 of 1979 was shown to the counsel for the first respondent herein to the effect that he had been injuncted from proceeding further with the execution proceedings taken by him before the District Munsif's Court of Sankari at Salem. The Court below after considering the earlier proceedings and the specific order made by this Honourable Court in C.M.S.A. No.167 of 1974, held that the first respondent will be entitled to the relief of delivery of possession of the immovable property and leaving it to the party to "seek his remedy before the Sub-Court by taking suitable actions" in respect of the *ad interim* injunction ordered in I.A.No.172 of 1979. Aggrieved against this order, judgment-debtor, who was the first respondent in the Court below, has preferred this civil revision petition contending that the executing Court is bound to respect the orders of a superior Court and it is bound to take subsequent events into consideration and give effect to it, and in any event, it can never act in such a manner as to compel a person to commit contempt of proceedings of another Court.

3. Mr. T.S.Subramaniam, counsel for the petitioner contends that the power to grant injunction is not circumscribed by what is provided under Order 39, Civil Procedure Code, and Courts being invested with inherent jurisdiction to grant the relief of injunction in the interests of justice, when a Court had chosen to injunct a party from participating in a pending proceedings, such an order should be respected by the other Court, and it can never act in a manner as to compel the party against whom injunction has been ordered, to disobey the order of injunction, and in this case, when a comprehensive suit has been filed by the petitioner herein in the Sub-Court taking into account the subsequent events, there can be no question of completing the process of execution which would result in grave injustice to the petitioner herein and would also lead to multiplicity of proceedings. His further contention is that the first respondent herein had not taken so far any step to have the *ad interim* injunction vacated, and so far as the Court below is concerned the order passed by it is illegal irrespective of whatever may be the direction that might have been issued by the High Court in C.M.S.A.No. 167 of 1974. He states that an Appellate or Revisional Court can intercept the proceedings of the subordinate Court by passing orders of injunction or stay. Otherwise one civil Court can interdict the proceedings of another civil Court by issue of an order of injunction, but every civil Court has the inherent jurisdiction to injunct a party to the proceedings in another Court irrespective of whether it is subordinate or not from further proceeding with the matter, and in this case when the decree-holder-first respondent herein had been injuncted by the Sub-Court from taking possession of the suit property pursuant to the decree passed in O.S. No. 543 of 1964, the executing Court acted illegally in directing delivery of the property by 24th March, 1979.

4. The learned counsel for the first respondent contends that when the High Court in C.M.S.A. No. 167 of 1974 has directed as follows:

> "Undoubtedly, the decree is executable Therefore there is absolutely no merits, in the C.M.S.A. which stands dismissed. The executing Court is directed to dispose of E.P.No. 742 of 1974 on or before the 15th August of 1978. I make it clear that in the event of the E. P. being allowed, the executing Court will not grant any time for delivery of vacant possession."

The executing Court is bound to conclude the matter irrespective of whatever be the injunction that may be obtained against the first

respondent herein, and as far as the Court is concerned, there being no order preventing it from further proceeding with the execution proceedings, it was well within it's right in directing delivery of possession of property. When the order passed in I. A. No. 172 of 1979 is only confined against the party to the proceedings. the executing Court is not bound to take cognisance of it and it is entirely for the concerned party to take steps for vacating the order of injunction in the Sub-Court and justify to that Court what had been done by him in compliance of the lawful order of the executing Court. It will not be open to the petitioner herein to prevent a Court from functioning effectively and disposing of the matter before it, by getting an order as against the party to the proceedings thus preventing him from lawfully prosecuting the matter before the civil Court. He states that I.A. No.172 of 1979 in O.S. No. 231 of 1979 was not proceeded with because time and again it was represented by the petitioner herein that this civil revision petition is pending disposal in this Court and therefore there is no need for passing any orders thereon.

5. The main point that arises for consideration is, whether the Court below was correct in directing delivery of possession of property by virtue of the directions given by this Court in C.M.S.A.No.167 of 1974 in spite of the order of *ad interim* injunction obtained against the first respondent alone in I.A. No. 172of 1979 in O.S.No.231 of 1979 filed subsequently by the petitioner herein in the Sub-Court of Sankari at Salem.

6. Mr.T.S. Subramaniam, counsel for petitioner in support of his contentions relies upon the following decisions to plead that when an order of interim injunction is obtained against a party to the proceedings preventing him from participating in the proceedings in another Court, the other Court is bound to take into account such an order and refrain from further proceeding with the matter because, the power exercised by the Court which granted the injunction is an inherent power which is much wider than what is contemplated under Order 39, Civil Procedure Code. He refers to the Division Bench decision rendered in *Bahadur Singh* v. *A. H. Forbes*,[1] wherein the judgment-debtor at the stage when the property was brought to sale by the executing District Court, filed a suit in a Sub-Court against the decree-holder claiming the property as his own and obtained an order of interim injunction restraining the decree-holder from selling the property. In spite of it the executing Court sold the property. It was held therein :

> "It may be quite true that the learned District Judge was not personally bound by the order of injunction, and indeed the Subordinate Judge could not have issued any injunction upon the Court of the District Judge, but the powers which the learned District Judge was asked to exercise were the inherent powers which he undoubtedly had of taking action in the particular circumstances of the case, and we, as a Court having superintendence over that Court, are also, I think, entitled to exercise our powers of superintendence over the District Judge; and if we think that he has clearly gone wrong, inadvertently it is true, assisting one of the parties in what amounts to a contempt of the order of the Court, then I think we are clearly entitled to take such steps as may be necessary to put the parties in the same position as if no contempt of Court had taken place."

In that case also, there was an order by the High Court but it was not in the nature of a mandatory order directing the property to be sold within a prescribed date. It was finally held that the order of sale made by the District Judge in spite of the order of interim injunction of the Subordinate Judge is of no effect and it would not be binding between the parties.

7. Then he relied upon a decision in *Milton & Company* v. *Ojha Automobile Co.*[1] and which arose under section 56 of the Specific Relief Act and it was held therein that the Court has inherent rights to protect suitors resorting to it apart from whatever is found in Order 39, Civil Procedure Code, and that "the order of one Indian Court may be effective against a person within the jurisdiction of another Indian Court, when a similar

1. A.I.R. 1922 Pat. 382.

1. A.I.R. 1931 Cal. 279.

order by an English Court would be of no avail against a person within a foreign jurisdiction."

8. *Umapati* v. *Subodha Chandra*[1], dealing with the scope of Order 39, Civil Procedure Code, held that "Order 39 does not exhaustively deal with the matter of granting of temporary injunction and apart from those provisions of Order 39 of the Code the Court can grant temporary injunction in the exercise of its inherent jurisdiction and there is nothing in section 56 of the Specific Relief Act to prevent the Court from restraining a party from proceeding with judicial proceedings". Dealing with the case arising under the Specific Relief Act, in *Sheo Nandan Prasad* v. *Sheo Parsan Pathak*[2], it was held that to avoid multiplicity of proceedings, injunction can be granted to restrain a party from executing his decree.

9. Finally, Mr. T. S. Subramaniam, counsel for the petitioner would refer to the decision of the Supreme Court in *Manohar Lal* v. *Seth Hiralal*[3], wherein it has been clearly held that the power of a civil Court to grant interim injunction is not restricted by what is found in Order 39, Civil Procedure Code and that it has inherent jurisdiction to issue an order of injunction in respect of matters which are not covered by it. In that case, a suit was first instituted by the plaintiff in Sub-Court, Asansol and during its pendency, the defendant filed a suit in the District Court, Indore and obtained an order of interim injunction under Order 39, Civil Procedure Code, restraining the "plaintiff" in the earlier suit from proceeding with the Asansol suit pending decision of the suit filed in the Indore Court. By relying upon the provisions in sections 94 and Order 39, Civil Procedure Code, it was contended that interim injunction can be issued only if provision is found under the rules and the grant of temporary injunction to prevent a party from participating in the proceedings in the earlier instituted suit, being not contemplated under the Rules, the order of interim injunction granted by the Indore Court is illegal. The Supreme Court taking note of the divergence of opinion between the several High Courts held that the

'Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39, Civil Procedure Code. There is no such expression in section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any Rules made under the Code.'

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" is only this that when the Rules prescribed the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed Rule. If the provisions of section 94 were not there in the Code, the Court Could still issue temporary injunctions but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

Having referred to the inherent powers of Courts in section 151, Civil Procedure Code, it was held that "it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure. The question of issuing an order to a party restraining him from proceeding with any other suit in a regularly constituted Court of law deserves great care and consi-

1. A.I.R. 1953 Cal. 377.
2. A.I.R. 1942 Pat. 349.
3. A.I.R. 1962 S.C. 527.

deration and such an order is not to be made unless absolutely essential for the ends of justice." In the said decision reference was made to *Cohen* v. *Rothfield*[1], wherein it has been held:

"Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings is another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court."

"While, therefore, there is jurisdiction to restrain a defendant from suing abroad, it is a jurisdiction very rarely exercised, and to be resorted to with great care and on ample evidence produced by the applicant that the action abroad is really vexatious and useless."

Ultimately, it was held that the Additional District Judge, Indore, was in error in issuing temporary injunction against the plaintiff in the earlier instituted Asansol suit from further proceeding with the suit.

10. Whereas the learned counsel for the first respondent would refer to the decision in *Mangal Achi* v. *I. S. Asoka*[2], wherein it was held that when a decree-holder who has lawfully obtained a decree further takes execution proceedings he is not committing any illegal injury and therefore, no injunction can be issued under Order 39, rule 2, Civil Procedure Code, and hence any order of injunction restraining the decree-holder-auction-purchaser from doing what was lawful for him to do, cannot be sustained. The only other decision relied upon by him is the one rendered in *Soosai Odayar* v. *R. Swaminatha Aiyer*[3], but I find that this has no relevance to the point in issue.

11. Therefore, it is apparent that the power of grant of injunction is an inherent power, which is not limited to what is prescribed under Order 39, Civil Procedure Code. But if the power is to extend as to prevent a party to the proceedings from participating in it, it will have to be exercised with great caution to avoid even the appearance of undue interference with another Court. The Supreme Court has clearly held that the inherent powers have to be exercised by the Court in very exceptional circumstances for which the Code lays down no procedure. No Court can ever pass an order which would stultify the other Court from proceeding with the matter in the manner in which it is expected to proceed and dispose of the matter, unless it be shown that the order of injunction or stay has been issued by a superior Court in an appeal or in a revision proceedings. The inherent power invested in a civil Court cannot be invoked to the extent of preventing another civil Court from proceeding with the matter on its file, unless it is subject to the revisional or appellate jurisdiction of the other Court. Before issue of *ad interim* injunction, there is always a bounden duty on the part of the Court to apply its mind to find out the nature of relief asked for and under what circumstances the party seeks its aid. It cannot in a bindfold manner issue orders of *ad interim* injunction, which would in effect result in the party to the proceedings in another Court committing contempt of the orders of the Court, which issued the injunction. The Supreme Court has ultimately held that the inherent power of the civil Court is available only if the party to the proceedings satisfies the Court that exceptional circumstances exist which call for necessary relief to be granted. Therefore unless a party who invokes the inherent jurisdiction satisfies the Court about the need for *ad interim* injunction against a party preventing him from further prosecuting the proceedings, which he is legally entitled to institute, the order of interim injunction will be an improper one.

12. So far as the present case is concerned the revision petition is not against the order of *ad interim* injunction granted in I.A. No. 172 of 1979 in O.S.No. 231 of 1979. It is therefore not necessary to go into the question of finding out to what extent the order of *ad interim* injunction passed by it is valid or not, but for the present purposes of finding out whether the executin Court was well within its right in ordering delivery of possession of property in spite of

1. (1919) 1 K.B. 410.
2. (1973) 1 M.L.J. 128: 86 L.W. 449 : A.I.R. 1973 Mad. 258.
3. (1936) 71 M.L.J. 227: 44 L.W. 384: A.I.R. 1936 Mad. 522.

the decree-holder being injuncted in I.A.No. 172 of 1979 from further proceeding with the execution proceedings, it has to be remembered that in C.M.S.A.No. 167 of 1974 this Court has directed the executing Court to complete the proceedings by a specific date unlike the nature of the order passed by the High Court in *Bahadur Singh* v. *A.H. Forbes*[1]. As held in *Mangal Achi* v. *V.S. Asokan*[2], when a decree-holder executes a decree he does not commit any illegal injury which would call for such a proceeding being injuncted with. The order of injunction issued in I.A.No. 172 of 1979 has been shown to the first respondent, and indirectly, the petitioner herein had asked the executing Court to stay its hands. Even though it may appear as if the petitioner herein has secured an order of injunction only against the first respondent, it is apparent that the order is intended to stultify the proceedings in another Court which proceeded to execute a lawful decree and which has been directed by this Court to be completed within the time indicated by it in C.M.S.A.No. 167 of 1974. Under such circumstances it cannot be said that the order of injunction issued is one which would justify the exercise of the inherent jurisdiction, which according to the Supreme Court can be invoked only in very exceptional and justifiable circumstances. As pointed out in *Cohen* v. *Rothfield*[3], this power should be exercised with great caution to avoid even the appearance of undue interference with another Court. Hence, I consider that when the circumstances above stated clearly go to show that the attempt of the petitioner herein is to interfere with the course of proceedings in another Court, it will be well within the jurisdiction of the executing Court to proceed further with the matter and dispose it of accordingly, leaving it to parties to work out their rights in the other Court.

13. Even though Mr. Subramaniam, counsel for the petitioner, contends that no Court shall act in such a manner as to compel a party to commit contempt of proceedings in another Court, I see no substance in such a contention because the Court which has issued the order of injunction would soon realise that it has passed an order claiming to be one in the exercise of its inherent jurisdiction, but in fact, it was an order which was secured by the petitioner herein without any justification. Though it is claimed that to avoid multiplicity of proceedings a Court can exercise its inherent jurisdiction it cannot be so in a case of this nature where the suit was instituted in 1964 and decree was obtained as early as on 4th April, 1968, and the decree-holder is prevented from getting possession of his property, and further realising the procrastination in the proceedings this Court went to the extent of fixing a time-limit for completion of delivery of possession of property. Under such circumstances, no civil Court can ever claim that it has inherent jurisdiction which would enable it to stultify the proceedings in another Court, by preventing a party to participate in execution proceedings lawfully instituted, and which can be proceeded with by the competent Court without any interference by another Court except the Appellate and Revisional Courts.

14. Though it is contended by the learned counsel for the petitioner that the Court below was in error in directing the first respondent herein to seek his remedy before the Sub-Court which would mean that he has to face contempt proceedings, by taking suitable action, in my view, the direction is not to the effect that he should face contempt proceedings in the Sub-Court, but it is intended to inform him that it is open to him to appraise the Sub-Court of the nature of the matter and as to why the executing Court is ordering delivery of possession of property in spite of the temporary injunction granted in I.A. No. 172 of 1979 and thereby have the order rescinded. Such a direction cannot be considered to mean that the first respondent herein is directed to face contempt proceedings.

15. At this stage, I consider it will be relevant to bear in mind as to what could happen to a party who is prevented from participating in proceedings which had been lawfully instituted by or against him. If it is a proceeding instituted by him and he is prevented by another Court from participating in such proceedings, for non-appearance the other Court may dismiss his case. In case he is a respondent, adverse orders will be passed against him. This will compel him to face the risk of losing his rights for ever, unless he is fortunate to have the matters restored and further procee-

1. A.I.R. 1922 Pat. 382.
2. (1973) 1 M.L.J. 128: A.I.R. 1973 Mad. 258.
3. (1919) 1 K.B. 410.

dings are taken well within time. Even while exercising the inherent power, the Court is bound to find out whether the expediency of the matter calls for *ex parte* order of *ad interim* injunction being passed or whether the purpcse cannot be achieved by first issuing notice to the party, and thereafter pass necessary orders on the injunction petition. In a matter like this, where the Sub-Court has been apprised of execution being taken and the relief is asked only against the party preventing him from further proceeding with the execution proceedings and when both the Courts are situate in the same building, it is unthinkable that the Sub-Court should have passed *ad interim* injunction without first issuing notice, particularly when it is exercising its inherent powers, which in the words of the Supreme Court should be exercised only in exceptional cricumstances.

16. I am of the view, that whenever an injunction has to be issued against a party preventing him from participating in lawfully instituted proceedings in another civil Court, it should be done first by issue of notice and only later on the Court after hearing both the parties pass suitable orders which would not interfere with proceedings in another Court. This procedure would enable it to become aware of the nature of the proceedings instituted, and if at all it is to injunct a party to participate in lawfully instituted proceedings it can be done only after satisfying the Court that exceptional circumstances necessitate relief to be granted to him which may be for the purposes of avoiding multiplicity of proceedings or to prevent injustice being caused. Except appellate or revisional Court no civil Court can pass an order of *ad interim* injunction which to its knowledge would result in a person being proceeded against for disobeying such an order merely because that person is participating and proceeding with the proceedings in another Court which is lawfully exercising its powers. For participation in lawful proceedings no Court can hold such a person as a wrong-doer. Hence before exercising the inherent power, instead of expecting the other Court to be prudent in not proceeding with proceedings the Court, wherein injunction petition is filed, alone should act with restraint or prudence so as to avoid embarrassment to both the Courts. After all it can afterwards give necessary reliefs for whatever harm, if any, occasioned by the orders of the other Court before which the party is bound to appear. Existence of power does not necessarily mean exercise of it without prudence and without precautions being taken. Issue of notice in a case of this nature would have prevented a party being put in the quandary of whether to appear before the executing Court and have the decree executed or involve himself in the likely contempt proceedings which may be taken for not complying with the injunction order. It is unfortunate that the first respondent herein had not even realised as to what should be done about I.A.No. 172 of 1979, in spite of the pendency of the civil revision petition. This Court had not granted any interim order and nothing prevents him from moving the Sub-Court to have the injunction order vacated. He could have moved this Court for necessary directions. If in case it delays the disposal of the application, necessary remedies are available in the superior Court to have the I.A. disposed of and if the order is adverse to him, he could have moved this Court, in which event, along with the civil revision petition, this Court would have prevented the anomalous situation in which a party is compelled not to participate in lawfully instituted proceedings. Therefore, taking into account the orders passed by this Court in C.M.S.A.No. 167 of 1974, which has directed the executing Court to dispose of the petition by 15th August, 1978, and which has compelled the Additional District Munsif's Court to order delivery of possession of properties leaving it to the first respondent to take suitable action before the Sub-Court being in order, this civil revision petition stands dismissed with costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

The Tirunelveli Weavers Co-operative Production and Sales Society Limited, 0981, Tirunelveli Town through its Secretary .. *Petitioner**

v.

The South India Bank Employees Union, Tirunelveli Town, through its General Secretary .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (*iii*)—*Business—Meaning of—Petition for eviction—Landlord Bank Employees Union—Activities of Union whether business—Held in the affirmative.*

The landlord being the South India Bank Employees. Union filed a petition for eviction under section 10 (3) (*a*) (iii) of the Tamil Nadu Act (XVIII of 1960) against the tenant after issuing a notice terminating the tenancy. Eviction was ordered by the Rent Controller, who found that the Union required the building for its own activities and that the requirement was also *bona fide*. Aggrieved by this, the tenant filed an appeal to the Appellate Authority. The Appellate Authority concurred with the conclusion of the Rent Controller. In revision against the order of eviction the only contention of the petitioner was that the activities of the Union could not be conceived as one of carrying on any business as such within the meaning of section 10 (3) (*a*) (iii) of the Act, and therefore the application was not maintainable.

Held: The activities of a Bank Employees Union comprises several facts. Apart from holding periodical Committee meetings and general body meetings, the activity of the Union is also directed towards securing benefits and privileges for the bank employees. To tie down the word "business" in section 10 (3) (*a*) (iii) to commercial activities involving profit-making would exclude a host of other activities falling under the broader definition of the word "business".

In view of the decision in *S. Mohanlal* v. *R. Kondaiah*, (1979) 2 S.C.J. 362: (1979) 2 A.P.L.J. (S.C.) 30 : (1979) 2 S.C.C. 616: A.I.R. 1979 S.C. 1132, the word "business", had to be understood in a very broad sense as an activity which occupied time, attention and labour for the purpose of livelihood or profit. The activities of the respondent-Union were such that they occupied the time as well as the labour and were intended to improve the service conditions of the bank employees and to promote and advance their welfare. Such activities on the part of the respondent would also be within the scope of the broader sense of the meaning of the expression "business". [*Para.* 4.]

Cases referred to:—

P. Vairamani Ammal v. *K.N.K. RM. Kannappa*, (1970) 2 M.L.J. 689; *Rolls* v. *Miller*, (1884) 27 Ch.D. 71; *Kesavan Nair* v. *Babu Naidu*, (1954) 2 M.L.J. 149 : 67 L.W. 408: A.I.R. 1954 Mad. 892; *S. Mohan Lal* v. *R. Kondaiah*, (1979) 2 S.C.J. 362: (1979) 2 S.C.C.616: (1979) 2 A.P.L.J. (S.C.) 30: A.I.R. 1979 S.C. 1132; *S. Mohan Lal* v. *R. Kondaiah*, A.I.R. 1970 A.P. 384; *G. Papachary* v. *Country Tobacco Merchants Association*, (1974) 2 An. W.R. 91.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973) praying the High Court to revise the Order of the Court of the Principal Subordinate Judge (Appellate Authority, Tirunelveli, dated 28th August, 1977 and made in C.M.A.No. 98 of 1977 H.R.C.No. 212 of 1975 Prl. D.M.C. (Rent Controller), Tirunelveli.)

R. Krishnamachari and *P. Ramachandran*, for Petitioner.

The Court delivered the following

JUDGMENT:—The tenant is the petitioner in this civil revision petition, which is directed against the order of eviction passed by the authorities below, on an application under section 10 (3) (*a*) (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, XVIII of 1960, as amended by Act XXIII of 1973 (hereinafter referred to as the Act) filed by the respondent herein which is the union of The South India Bank Employees. According to the respondent, the building in question was purchased by the union from one Subramania Pillai

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* C.R.P.No. 1113 of 1979.

6th August, 1980.

on 24th May, 1974 and even at that time, the petitioner was in occupation of the building as a tenant on a monthly rental of Rs. 60 payable on or before the 5th of every succeeding month. Claiming that the building in question is a non-residential one and that the union has no building of its own to house its office to conduct the meetings and carry on the business of the union, the respondent filed an application undersection 10 (3)(*a*) (iii) of the Act for an order of eviction against the petitioner, after issuing a notice terminatingthe tenancy. That application was resisted by the petitioner herein contending that while the petitioner was arranging to purchase the property from Subramania Pillai, the union had purchased the same and that the union is now housed in a spacious place where it is carrying on its business smoothly and without any hardship. The further case of the petitioner was that he has been carrying on business in dyeing and weaving and that he is aware of the functioning of the union which is a corporate body which cannot ask for an order of eviction on the grounds stated by it.

2. The learned Rent Controller (Principal District Munsif), Tirunelveli, who enquired into the application held on a consideration of the oral as well as the documentary evidence that the union had established that it requires the building for its own activities and occupation and that such requirement is also *bona fide*. On this finding, an order for eviction was passed against the petitioners. Aggrieved by this, the petitioner preferred an appeal in C.M.A.No. 98 of 1977 before the Appellate Authority (Principal Subordinate Judge), Tirunelveli. The Appellate Authority also concurred with the conclusion of the Rent Controller and held that the holding of the meetings of the union, general body meeting, committee meetings, etc., would amount to carrying on of the business of the union in connection with which the respondent is entitled to secure possession of its own building under the provisions of section 10 (3) (*a*) (iii) of the Act. Consequent to this finding, the order of eviction passed by the Rent Controller was upheld and the appeal was dismissed. It is the correctness of this order that is challenged in this revision.

3. The only contention of the learned counsel for the petitioner is that an entity like the respondent-union cannot be conceived of as carrying on any business as such within the meaning of section 10 (3) (*a*) (iii) of the Act and, therefore, the application filed by it under that section is not maintainable. On the other hand, the learned counsel for the respondent contends that the word "business" used in section 10 (3) (*a*) (iii) of the Act should be construed in the sense of activities that occupy the time, attention and labour for the purpose of livelihood or profit and considered in this light, the activities of an union will also be comprehended within the term "carrying on business" and, therefore, the petition for eviction filed by it is maintainable. Section 10 (3) (*a*) (i) deals with residential buildings, while sections 10 (3) (*a*) (ii) and (iii) deal with non-residential buildings. It may be pointed out that the Act by itself does not define a residential building or a non-residential building. With reference to residential buildings, if the requirements of section 10 (3) (*a*) (i) of the Act are satisfied, then the landlord will be entitled to recover possession of the same from the tenant. With reference to non-residential buildings, the Act has made provision with reference to a non-residential building used for the purpose of keeping a vehicle or adapted for such use and other non-residential buildings. The former category of non-residential buildings would fall within section 10 (3) (*a*) (ii) of the Act, while all other non-residential buildings would be covered by section 10 (3) (*a*) (iii) of the Act. The present case is one where the building would fall under section 10 (3) (*a*) (iii) of the Act. It is only on account of this the respondent also filed the application under that section.

4. The next question that arises is, whether the landlord is not occupying for purpose of a business which it is carrying on, a non-residential building in the city, town or village concerned which is its own. It is not in dispute that the respondent is not occupying any other building of its own, but is now housed in a rental premises and consequently, this requirement under section 10 (3) (*a*) (iii) of the Act is also satisfied. The only other requirement that must be fulfilled before the respondent could seek to recover the premises in the occupation of the petitioner is that the respondent should be carrying on a business. The word "business" is also not defined in the Act. Accord-

ing to Shorter Oxford English Dictionary, "Business" means.—

> "the state of being busily engaged in anything"; "activity", that about which one is busy"; "functions"; "occupation"; "that with which one is concerned at the time."

Bouvier's Law Dictionary states that "business" means:—

> "that which occupies the time, attention and labour of men for the purpose of livelihood or profit".

In Shorter Oxford English Dictionary, the word "profit" is stated to mean—

> "to make progress"; "to advance";
> "to improve"; "to be of advantage".
> "to benefit, further, promote".

The activities of a bank employees' union like the respondent herein comprise of several facets. Apart from the holding of periodical committee meetings and general body meetings, the activity of a bank employees, union is also directed towards securing benefits and privileges for the purpose of such bank employees. It is common knowledge that as a result of the sustained efforts of such bank employees' unions, the wage conditions, leave and other benefits of the bank employees and a host of other privileges like extra allowances, holidays, medical benefits, etc., have been secured to the bank employees. Undoubtedly, the process of securing those benefits had occupied the time, attention and labour of the union for the purpose of the profit of its members. To tie down the applicability of the expression "business" only to commercial activities involving profit-making would, in my view, exclude a host of other activities falling under the broader definition of the word "business", as in the present case. It cannot be disputed that as a result of the activities and efforts of the union, the working conditions of the bank employees had been improved and they have been considerably benefited as a result of the exertions of the union. Under these circumstances, it is not possible to accept the contention of the learned counsel for the petitioner that the word "business" in section 10 (3) (*a*) (iii) of the Act must be confined only to the profit aspect of the business activity. Considering the question whether the carrying on of a *thanneerpandal* activity is a business under section 10 (3) (*a*) (iii) of the Act, Kailasam, J. as he then was, in ***P. Vairamani Ammal*** v. ***K. N. K. RM. Kannappa***[1], observed thus:

> "The Oxford Dictionary gives the meaning of the word "business" as "being busy, task, duty.....habitual occupation, profession, trade, serious work". It is, therefore to be seen that the word has a very wide import and would cover every activity where men keep themselves busy. In Halsbury's Laws of England, 3rd Edition, Volume 38, the word 'business' is stated as a wider term than and not synonymous with trade and means practically anything which is an occupation as distinguished from a pleasure........In this context "the term" for purposes of a business" will have to be construed. There can be no objection to the landlord carrying on a business which is not strictly commercial as for instance, using the building as a place of worship or *Bajana Mandapam* or *Thanneerpandal*. These are absolutely legitimate objects to which the landlord can put to use his building. The object of the enactment being one to regulate the occupation of residential and non-residential buildings, I can see no prohibition against the landlord putting the buildings to any legitimate use and also requiring the building *bona fide* for any legitimate use. So long as the object is a legitimate one and so long as the requirements of the sub-section are fulfilled, I see no reason for restricting the meaning of the term "for purposes of a business". If the legitimate activity by the landlord will be his business the ordinary meaning of the word "business" applies, and there is no warrant for construing the word "business" in the very restricted way and to confine it to commercial activities or activities of trade alone."

The learned Judge proceeded to consider *Rolls* v. *Miller*[2], where it was held that the word "business" meant almost anything which was an occupation as distinguished from a pleaure, anything which was an occupation or duty which required attention was a

1. (1970) 2 M.L.J. 689.
2. (1884) 27 Ch. D. 71.

business. In *Kesavan Nair* v. *Babu Naidu*[1], the term "business" was held not to have a technical meaning but that that expression has to be read with reference to the object and intent of the Act in which it occurs. The Supreme Court of India had occasion to deal with the import of the word "business" in relation to the carrying on of the profession of law by a lawyer in *S. Mohan Lal* v *R. Kondaiah*[2], While affirming the judgment of the Division Bench of the Andhra Pradesh High Court in *S. Mohan Lal* v. *R. Kondaiah*[3], the Supreme Court observed thus:

> "It is needless to refer to the meanings given to that term in the various dictionaries except to say that everyone of them notices a large number of meanings of the word. In a broad sense it is taken to mean 'everything that occupies the time, attention and labour of men for the purpose of livelihood or profit'. In a narrow sense it is confined to commercial activity."

In view of the above decision, the word "business" has to be understood in a very broad sense as an activity which occupies time, attention and labour for the purpose of livelihood or profit and it has already been pointed out that the activities of the respondent-union are such that it occupies the time as well as the labour and are intended to improve the service conditions of the bank employees and to promote and advance their welfare. Such activities on the part of the respondent would also be within the scope of the broader sense of the meaning of the expression "business". In *G. Papachary* v. *Country Tobacco Merchants Association*[4], Ramachandra Rao J., had occasion to consider the question of the entitlement of an association of persons for an order of eviction from the premises owned by it on the ground that it required the premises for its own business. It was pointed out by the learned Judge that though the association as such did not carry on any business, yet, its objects and activities were such as would amount to carrying on business activities which would fulfil the requirement of the provision. In *St. Joseph's Armoury Cunasmith*, by its partner *Mr. Jacob* v. *Com. Venkidu, Secretary, Communist Party of India (Marxist), Coimbatore*[1], Nainar Sundaram, J., had occasion to consider the question whether the Communist Party of India can seek an order for eviction in respect of its own premises in the occupation of a tenant on the ground that it requires the premises for its own business. The learned Judge held that being a political party, its business is to carry on activities to progress, to advance and to improve its cause in the political sphere and it must have an office and it is only to serve this requirement, eviction was sought for under section 10 (3) (*a*) (iii) of the Act and such an application was perfectly maintainable. As pointed out earlier, in the present case also, the union is the means through which the progress, advancement, and improvement of the conditions of service of the bank employees is sought to be achieved and for the purpose of locating its office in the premises, the respondent sought an order for eviction against the petitioner. The requirement in the instant case also would fall within section 10 (3) (*a*) (iii) of the Act, as the respondent requires the premises for the purpose of a "business" which it is carrying on and consequently, the orders of the Courts below have to be maintained. The result is, the civil revision petition fails and is dismissed. No costs.

5. The counsel for the petitioner prays that some time may be given to enable the petitioner to vacate the premises and the learned counsel for the respondent has no objection to grant three months' time for this purpose. Accordingly, the petitioner will have three months' time from to-day, to vacate and hand over vacant possession of the premises to the respondent.

S.J. —— *Petition dismissed.*

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1. (1954) 2 M.L.J. 149: 67 L.W. 408: A.I.R. 1954 Mad. 892.
2. (1979) 2 S.C.C. 616: (1979) 2 A.P.L.J. (S.C.) 30: (1979) 2 S.C.J. 362: A.I.R. 1979 S.C. 1132.
3. A.I.R. 1970 A.P. 384.
4. (1974) 2 An.W.R. 91.

1. C.R.P. No. 924 of 1979, dated 25th July, 1980.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

Sri Kailasanathaswami and Nithyakalyani Amman Devasthanam at Ilayathankudi by its Hereditary Trustees C. T. AL. V. R. Chidambaram Chettiar and others

.. *Appellants**

v.

M. Chockalingam Chettiar and others

.. *Respondents.*

(A) *Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 64 (5)—*Scope and applicability — Public Temple—Scheme framed by Court—Modification of scheme — Deputy Commissioner can exercise power to modify subject to conditions and restrictions.*

(B) *Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 118 (2)—*Scope and applicability — Schemes settled or modified by Court—Whether excluded.*

Held: The Hindu Religious and Charitable Endowments Act, has expressly contemplated a particular mode for the exercise of the power to modify a scheme under section 64 (5) (*a*) and so long as that mode has not been prescribed the power itself is incapable of being exercised. The prescription of the conditions and restrictions is a condition precedent to the exercise of the power. The Deputy Commissioner of Hindu Religious and Charitable Endowments had no jurisdiction to pass the impugned order in question as the conditions and restrictions under which alone the Deputy Commissioner can exercise the powers conferred on him under section 64 (5) (*a*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, had not been prescribed. The order of the Deputy Commissioner as confirmed by the Commissioner has to be set aside. [*Paras.* 5, 6.]

Cases referred to:—

Muthiah Chetti v. *Periannan Chetti,* (1916) 4 L.W. 228: 34 I.C. 551; *Radhakrishnan* v. *Manickam,* (1974) 2 M. L. J. 179; *T. D. Thathachariar* v. *Deputy Commissioner, Hindu Religious and Charitable Endowments,* (1970) 2 M.L.J. 475.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 65 of 1971 dated 25th January, 1973.

K. S. Bakthavatsalam and *P. Venkataraman,* for Appellants.

The Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants.

The plaint averments are:—The suit temple Sri Kailasanatha Swami and Nithyakalyani Amman Devasthanam at Ilayathankudi is a temple founded by the Nagarathars belonging to the Ilyathankudi sect of Nattukottai Chettiar community. It was managed by the Nagarathars themselves by people nominated by the Karaikar's family and by other sub-divisions of Nagarathar community. A suit was filed in the Sub-Court, Ramanathapuram at Madurai in O.S. No. 34 of 1912 for framing a scheme for management and finally this Court in A.S. No. 72 of 1923 settled a scheme of management under the Hindu Religious Endowments Act. In the year 1964, the Deputy Commissioner of Hindu Religious and Charitable Endowments Department, Madurai, initiated proceedings under section 64 (5) of Tamil Nadu Act XXII of 1959, for the modification of the scheme settled by the High Court and issued notice to the Nagarathars to show cause why the scheme settled by the High Court cannot be modified in accordance with the draft scheme. An enquiry was made by the Deputy Commissioner in O.A. No. 4 of 1964 and he passed an order on 28th December, 1967, whereby the draft modified scheme was confirmed with certain modifications, but wholly changing the spirit of the original scheme by appointing an Executive Officer and vesting the properties of the temple with him and limiting the powers of the trustees. An appeal to the Commissioner proved fruit-

* Appeal No. 622 of 1976. 4*th March,* 1980.

less and the modified scheme was confirmed with very slight alternations. The plaintiff contended that that order is not just and proper, that the administration of the temple was carried on efficiently and that there is no reason why an Executive Officer should be appointed. The appointment would not be in the interest of the institution, nor will it be an improvement of the existing arrangement. The plaintiffs have therefore filed the suit to set aside the scheme framed by the Deputy Commissioner in modification of the original scheme framed by the High Court.

2. Defendants 1 and 2 submitted to a decree and the third defendant remained *ex parte*. The fourth defendant-Commissioner, Hindu Religious and Charitable Endowments Department in his answer contended that the plaintiff-temple is a public temple and the Deputy Commissioner of Hindu Religious and Charitable Endowments Department initiated proceedings *suo motu* under section 64 (5) of the Tamil Nadu Act XXII of 1959, for modifying the scheme and after an enquiry the Deputy Commissioner passed an order modifying the scheme and the appeal to the Commissioner was also dismissed making some alterations in the scheme and that the allegation that appointment of Executive Officer will amount to withdrawal of most of the management of the trustees is incorrect. The further contention is that it will be in the interest of the institution that a responsible officer of the Government as an Executive Officer is necessary, more particularly when the plaintiff temple is a wealthy temple deriving a good income, and that there are no grounds for cancellation of the order of the fourth defendant.

The learned trial Judge framed the following issues:

(1) Whether the order of the Deputy Commissioner dated 28th December, 1967 in O.A. No. 4 of 1964 and the order of the Commissioner|4th defendant dated 31st October, 1970 in A.P. No. 32 of 1968, are liable to be set aside?

(2) To what relief is the plaintiff entitled?

He came to the conclusion that the order of the Deputy Commissioner, evidenced by Exhibit A-4, and the order of the Commissioner, Exhibit A-5, are not liable to be set aside and that they have to be confirmed. In the end, he dismissed the suit with costs. Aggrieved, the plaintiffs have filed this appeal.

3. The suit temple was managed by the families of Ilayathankudi Kovil Nagarathars. A suit was filed on the file of the Sub-Court, Ramanathapuram at Madurai in O.S. No. 34 of 1912 by one Periannan Chetty for settling a scheme for management. In that suit, the Subordinate Judge found that the temple is a public Hindu temple and that a scheme is necessary. On appeal, the learned Judges of the Division Bench of this Court agreed with the conclusion of the Subordinate Judge that 'it is desirable that a scheme should be settled' (Please see *Muthiah Chetti* v. *Periannan Chetti*[1]). Finally, a scheme was settled in A.S. No. 72 of 1923 and C.R.P. No. 258 of 1923 by the High Court. That scheme was in force till the Deputy Commissioner initiated proceedings under section 64 (5) of the Tamil Nadu Act XXII of 1959, for the modification of the scheme settled by the High Court. The Deputy Commissioner, after an enquiry, modified the scheme. That order with a minor alteration was confirmed by the Commissioner. The plaintiffs now seek to set aside that order of the Deputy Commissioner as confirmed by the Commissioner.

4. One of the contentions of Mr. Alagar, learned counsel for the appellants is that the statute has expressly contemplated a particular mode for exercise of the power by the Commissioner under section 65 (4) (*a*) of Act XXII of 1959 (hereinafter referred to as the Act) and so long as that mode has not been prescribed the power itself is incapable of being exercised and having regard to the language of the proviso to section 64 (5) (*a*) and the object sought to be achieved by it, the prescription of conditions and restriction is a condition precedent to the exercise of the power itself by the Commissioner and so long, as the conditions and restrictions subject to which alone the Commissioner can exercise the power, have not been prescribed, the

1. (1916) 4 L.W. 228 : 34 I.C. 551.

Commissioner cannot exercise the power conferred on him under section 65 (4) (*a*). Mr. Alagar raised a second point and that is section 118 (2) (*a*) of the Act does not deal with the scheme settled or modified by the Court at all and on that ground also the order of the Deputy Commissioner has to be set aside. In support of his contentions, he relies on *Radhakrishnan* v. *Manickam*[1]. It would be relevant to extract section 64 (5) (*a*) of the Act and the proviso thereunder:

> "5 (*a*). The Deputy Commissioner may, at any time, after consulting the trustee and the persons having interest, by order, modify or cancel any scheme in force settled under sub-section (1) or any scheme in force settled or modified by the Board under the Madras Hindu Religious Endowments Act, 1926, or deemed to have been settled under that Act, or any scheme in force settled or modified by the Deputy Commissioner or the Commissioner under this Act, or any scheme in force settled or modified by the Court in a suit under sub-section (1) of section 70, or on an appeal under sub-section (2) of that section or any scheme in force deemed to have been settled or modified by the Court under clause (*c*) of sub-section (2) of section 118:
>
> Provided that such cancellation or modification of a scheme in force settled or modified by the Court in a suit under sub-section (1) of section 70 or on an appeal under sub-section (2) of that section or of a scheme in force deemed to have been settled or modified by the Court under clause (*a*) of sub-section (2) of section 118 shall be made only subject to such conditions and restrictions as may be prescribed".

G.O. No. 4851, Revenue, dated 26th November, 1960 deals with the procedure to be followed by the Deputy Commissioner under section 64 of the Act. Rules 1 to 4 are relevant in so far as the Deputy Commissioner is concerned. *Radhakrishnan* v. *Manickam*[1], is a case relating to a mutt in Nerinjipettai, Bhavani Taluk, Coimbatore District. The Division Bench dealt with the scope of section 65 (4) (*a*) of the Act and dealt with the powers of the Commissioner to modify the scheme settled by Court. A reading of both sections 64 and 65 would show that under section 64, the Deputy Commissioner is exercising the powers with reference to a temple or a specific endowment attached to it. In dealing with these powers, the following observations of the learned Judges of the Division Bench are relevant:

> "It could not have been in the contemplation of the Legislature to give a *carte blanche* to a Commissioner or Deputy Commissioner under the Act to deal with a scheme settled by such a Court in any manner he pleases. As a matter of fact, the power conferred by clause (*a*) of sub-section (4) of section 65 not merely deals with the power to modify a scheme but even to cancel a scheme. The exercise of the power to cancel a scheme settled by a Court will amount to the reversal of a decree of the Court itself. The Legislature could not have lightly contemplated an officer functioning under the Act reversing a decree of the highest Court of the land and it is in view of this alone, the Legislature has provided for specific restrictions and guidelines for the exercise of the power by the Commissioner with reference to a scheme settled by a Court to be prescribed by indicating the circumstances under which alone the Commissioner will be justified in either modifying or cancelling a scheme settled or modified by a Court. What we are pointing out with regard to the Commissioner will apply to the Deputy Commissioner also under section 64 (5) (*a*) of the Act. Therefore, we are clearly of the opinion that it was the definite intention of the Legislature that the power of the Commissioner under section 65 (4) (*a*) of the Act should be a restricted power and should not be an unguided power and that power can be exercised only under conditions and restrictions prescribed by the Government which would certainly take note of the fact that the Commissioner may be dealing with or interfering with a scheme settled or interfering with a scheme settled by the higest Court of the land. Therefore, simply as a matter of construction of the speci-

1. (1974) 2 M.L.J. 179.

fic statutory provision contained in the Act, against the background indicated above, we have come to the conclusion that the power conferred upon the Commissioner having regard to the proviso to section 65 (4) (*a*), cannot be exercised by him, unless conditions and restrictions have been prescribed in this behalf for the purpose in question".

In dealing with section 65 (4) (*a*) of the Act, the learned Judges stated that the statute has expressly contemplated a particular mode of exercise of the power by the Commissioner and so long as that mode has not been prescribed, the power itself is incapable of being exercised. They further observed that as a matter of fact so far as the proviso to clause (*a*) of sub-section (4) of section 65 is concerned, it does not provide merely a mode for exercising power, but it really constitutes restriction or circumspection on the exercise of the power itself and therefore without there being the prescription therefor, the power itself is incapable of being exercised. They finally came to the conclusion that so long as the conditions and restrictions subject to which alone the Commissioner can exercise his powers, have not been prescribed, the Commissioner cannot exercise the power conferred on him under clause (*a*) of sub-section (4) of section 65 of the Act. What applies to the Commissioner applies to the Deputy Commissioner also. The learned Judges of the Division Bench further observed that having regard to the language of the proviso to section 64 (5) (*a*) and the object sought to be achieved by it, the prescriptions of conditions and restrictions is a *sine qua non* for exercise of the power by the Deputy Commissioner.

5. In this case Mr. Alagar points out that no notice was given to Nagarathars. Nothing was produced by the respondent-Hindu Religious and Charitable Endowments Department to show that notice was given to Nagarathars. Exhibit A-2 shows that notice was given to trustees and to Chockalingam Chettiar, a banker. It is pointed out that the conditions and restrictions subject to which alone the Deputy Commissioner can exercise his powers *have not been prescribed in this case* and therefore the Deputy Commissioner cannot exercise the power conferred on him under section 64 (5) (*a*). Mr. Suryaprakasam, learned Assistant Government Pleader, after consultation with the Department, stated that in this case the conditions and restrictions have not been published till March, 1975. There is an amendment to the Rules and rule 8 (1) states that the Deputy Commissioner or the Commissioner, as the case may be, shall satisfy himself before modifying or cancelling a scheme settled or deemed to have been settled by a Court, that such modification or concellation is necessary under the conditions prescribed in G.O. Ms. No. 265, C.T. and R.E., dated 8th March, 1975. Therefore, on the date when the scheme was modified and till the judgment was rendered, no conditions and restrictions subject to which the Deputy Commissioner can exercise his power, have been prescribed. The observations of the Division Bench are binding on me and following those observations with respect, I am of the view that as conditions and restrictions enumerated in G.O. No. 265, dated 8th March, 1975 have not been prescribed the Deputy Commissioner cannot exercise the powers under section 64 (5) (*a*) of the Act and consequently the order of the Deputy Commissioner as confirmed by the Commissioner has to be set aside.

6. As regards the second contention, the Division Bench is of the view that section 118 (2) (*a*) does not deal with scheme settled or modified by a Court at all. They further observed that it is not open to the Court to supply the omission. The reasons for so holding are given in the following terms:

"We may also point out that it can be contended that as the language now stands, all the schemes settled or modified or deemed to have been settled or modified under the provisions of the Hindu Religious and Charitable Endowments Act, 1951, fall outside the scope of section 65 (4) (*a*), because that clause refers to 'schemes deemed to have been settled or modfied by the Court under clause (*a*) of sub-section (2) of section 118' and consequently excludes schemes deemed to have been settled or modified by other authorities under section 118 (2) (*a*) and at the same time does not take in schemes deemed to have been settled or

modified by a Court since section 118 (2) (*a*) does not cover such schemes".

My attention was invited by the learned Assistant Government Pleader to *T. D. Thathachariar* v. *Deputy Commissioner, Hindu Religious and Charitable Endowment*[1]. There the learned Chief Justice and Gokulakrishnan, J., were of the view that section 64 (5) (*a*) of the Act includes a scheme (*a*) of sub-section (2) of section 118. Mr. Alagar learned counsel for the appellant, though argued this point, is not pressing this point for the present, in view of the observation in *T. D. Thathachariar* v. *Deputy Commissioner, Hindu Religious and Charitable Endowment*[1], and he says that it may be left open to be decided at the appropriate time. As I am of the view that the appeal has to be allowed on the other point, namely that the Deputy Commissioner will not have jurisdiction to modify the scheme as the conditions and restrictions have not been prescribed when the Deputy Commissioner passed the order, I am not deciding this question. As the Deputy Commissioner has no jurisdiction to pass the impugned order in question as conditions and restrictions under which alone the Deputy Commissioner can exercise the powers conferred on him under section 64 (5) (*a*), have not been prescribed, the order of the Deputy Commissioner as confirmed by the Commissioner has to be set aside.

7. The appeal is allowed and the judgment and decree of the Court below are set aside and the suit is decreed. No costs in this appeal and in this suit.

R.S. —— *Appeal allowed.*

1. (1970) 2 M.L.J. 475.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Manickam *alias* Manickavasagam and others .. *Appellant**

v.

Ramaswamy Gounder and another .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 96 *—Appeal, who can file—"Aggrieved person", meaning of — Alternative prayer granted — Plaintiff whether barred from filing appeal—Approbate and reprobate—Applicability.*

It is no doubt true, that where a plaintiff asks for reliefs in the alternative and puts the alternative reliefs on a par with each other, he should be deemed to have made an election even at the threshold and after grant of one of such alternative reliefs, he is not an "aggrieved person" who could carry the matter to the higher Court for the grant of that relief which was not given by the trial Court. In the instant case however, the two prayers made by the plaintiff in the suit cannot be treated as alternative reliefs in the strict sense of the term. [*Para.* 7.]

Unless a party is shown to have fully approbated to an alternative relief granted to him, he will not stand legally precluded from reprobating the decree and re-agitating his claim for other relief, which was not given to him. In the present case the alternative relief of partition asked for by the plaintiff had not been placed by him on par with the main relief of declaration of title and injunction and therefore, the defendants cannot base the contention that the plaintiff was not an aggrieved person and consequently his appeal to the lower appellate Court was itself not maintainable. [*Para.* 7.]

Cases referred to:—

Sakku Bai Ammal v. *Babu Reddiar,* (1977) 1 M.L.J. 311: I.L.R. (1976) 2 Mad. 317: A.I.R. 1977 Mad. 223; *Ramesh Chandra* v. *Chuni Lal,* (1971) 2 S.C.J. 619: (1971) 2 S.C.R. 573: A.I.R. 1971 S.C. 1238.

*S.A. No. 704 of 1977. *4th July,* 1980.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul dated 18th October, 1976 and passed in Appeal Suit No. 134 of 1973, preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 978 of 1971.

K. Doraiswami, P. Sathasivam and *Nallathambi,* for Appellants.

E. Padmanabhan, for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 1 to 9, 11 to 15, 17 to 25, 27 to 35 and 38 to 40, in the trial Court, respondents 41 to 43 (legal representatives of the deceased 10th respondent) and respondents 44 and 45 (legal representatives of the 16th respondent) in the lower appellate Court are the appellants. The plaintiff (first respondent herein) filed this suit, O.S. No. 978 of 1971 on the file of the Court of the District Munsif, Dindigul, for declaration of title and injunction in respect of the plaint A Schedule properties, failing which, for partition of his one-eighth share in the total extent of properties comprised in plaint Schedules A and B and for equitable allotment of the A Schedule portion to him. The District Munsiff declined to grant the first of the prayers and held that the plaintiff was entitled only to a decree for partition, but even there, he was not entitled to equities in his favour in the matter of the allotment of the A Schedule portion to him. Not satisfied with the decree passed in his favour the plaintiff preferred A.S. No. 134 of 1973 to the Subordinate Judge, Dindigul to reiterate his claim for declaration and injunction in respect of the A Schedule property. The appellants herein preferred a memorandum of cross-objections to canvass the correctness of the decree for partition granted by the trial Court to the plaintiff. The learned Subordinate Judge dismissed the cross-objections and allowed the plaintiff's appeal and granted him the reliefs of declaration and injunction with reference to the A Schedule property. It is as against the reversing judgment of the Subordinate Judge the appellants have preferred the second appeal.

2. The brief facts which require to be noticed are as follows:—The A and B Schedule properties are situate on the west of the catchment area of Kasigoundankulam in Kalvarpatti village and originally belonged in common to the ancestors of the plaintiff as well as the defendants. The lands were originally being enjoyed as pasture lands. The parties were entitled to graze eighty heads of cattle and the respective sharers were grazing cattle in proportion to their shares. The plaintiff is entitled to an one-eighth share, *i.e.,* to graze ten heads of cattle; defendants 16 to 19 are jointly entitled to graze 7½ heads of cattle; defendants 14, 26 and 27 are together entitled to graze 2¼ heads of cattle; defendants 30 to 35 are each entitled to graze one head of cattle; the remaining shares belonged to the other branches who were also making use of the pasture lands in accordance with their shares. Subsequently, the sharers found that the lands can, with advantage, be brought under cultivation and therefore, decided to effect a partition between the various sharers so that they could conveniently raise crops on the portions allotted to them. Accordingly, a partition was effected and the plaintiff who is the major sharer was allotted the A Schedule properties towards his one-eighth share in the lands. An extent of about 2 acres in Survey Nos. 562|1 and 562|2 was also included in the portion allotted to the plaintiff on account of the fact that the land comprised in these two sub-divisions would always be water-logged and hence unfit for cultivation. The defendants were allotted various portions in the land set out in the B Schedule. For effective and convenient enjoyment of the A Schedule property, the plaintiff at first put up a thorny fence to enclose the property. But after some years, the plaintiff found it difficult to keep the thorny fence in good repair and hence he replaced the thorny fence with a live fence. The plaintiff dug a new well in the same place where the old well which had become silted up, was situate. The plaintiff had been raising crops in the A Schedule land and enjoying the same exclusively all these years. Likewise, defendants 2, 3, 24 and 25 had also enclosed the portions of land allotted to them by means of fences and were enjoying their properties separately. The other defendants, however, chose to keep the portions allotted to them as one plot and they were using the land only as grazing ground. By

the intensive efforts taken by him, the plaintiff had developed the A Schedule land into an admirable garden land and such development made the defendants envious of the plaintiff. Defendants 1 to 14 called upon the plaintiff in the year 1970 to reopen the partition, but since the plaintiff did not yield to their demand, those defendants along with their henchmen, attempted to trespass into the A Schedule property on 28th October, 1970 and they actually demolished the fences on the northern and eastern sides of the land. The plaintiff preferred a complaint to the police at Vedasandur against defendants 1 to 14 and they were duly charged and convicted in the criminal Court. In spite of the conviction, defendants 1 to 14 as well as the other defendants were casting covetous eyes on the A Schedule land and were making preparations to trespass upon the land once again. It was in such circumstances the plaintiff came forward with his suit. He prayed that the Court should pass a decree in his favour declaring his title to the A Schedule property and also grant him a permanent injunction to restrain the defendants from interfering with his possession and enjoyment of the same. As a secondary relief, the plaintiff prayed that if, for any reason, the Court found that there had been no partition and that the A Schedule property had not been allotted to him, then the Court should pass a decree for partition of his one-eighth share in the A and B Schedule lands and for allotment of the A Schedule land to him by way of equity since he had effected significant improvements on the land at considerable cost.

3. The 37th defendant remained *ex parte*, but the other defendants contested the suit and filed different sets of written statements. The common defence taken by the defendants in their respective written statements was that there had been no partition between the various sharers of the land and the plaintiff had at no time been allotted the A Schedule land towards his one-eighth share. They refuted the plaintiff's statement that the lands which were originally grazing lands had been converted into cultivable lands and that the plaintiff had been raising crops on the A Schedule land. They denied the plaint averment that the plaintiff had fenced his portion of the land, *i.e.*, the A Schedule land with thorny fence originally and with live fence subsequently. They also refuted the plaintiff's claim that he had effected improvements to the A Schedule land at considerable cost. They denied the plaintiff's charge that they had trespassed upon his property and demolished the fence. Their further case was that the plaintiff was not in exclusive possession of the A Schedule land and on the other hand, he was in joint possession with the rest of the co-owners over the plaint A and B Schedule properties and therefore, the plaintiff was not entitled to a decree for injunction.

4. After evaluating the evidence adduced by the parties in support of their respective cases, the District Munsif rejected the cases of partition set up by the plaintiff and therefore, declined to grant the first of the prayers asked for by the plaintiff. He, however, found that the plaintiff was entitled to one-eighth share and therefore, granted a decree for partition, but even there, he held that the plaintiff was not entitled to work out any equities in his favour.

5. The learned Subordinate Judge, while dealing with the appeal and the cross-objections filed by the plaintiff and the defendants respectively, assessed the parties with reference to the evidence and found that the plaintiff's case was true and acceptable. Consequently, he allowed the plaintiff's appeal and granted a decree for declaration and injunction and dismissed the memorandum of cross-objections. Against the judgment of the appellate Judge, the appellants have come forward with this second appeal.

6. From what has been stated above, it may be seen that the principal controversy in the case is whether there had been a prior partition between the parties and if such a partition had taken place, whether the A Schedule property had been allotted to the plaintiff towards his one-eighth share. Though the lower appellate Court has reversed the finding of the trial Court and held that an oral partition as pleaded by the plaintiff should have taken place about twenty years before the filing of the suit and in that partition the plaintiff had been allotted the A Schedule property, it cannot be disputed that the finding

has been rendered purely on appreciation of the evidence. Such being the case, it is not open to the defendants to canvass, in the second appeal, the correctness of the findings rendered by the Subordinate Judge. However, even if some indulgence were to be shown to defendants in this behalf, I do not think the findings of the appellate Judge lend themselves open to criticism. The Subordinate Judge has pointed out that the plaintiff has been paying kist continuously for a fraction of the property from the year 1927 till 1971 as evidenced by the kist receipts, Exhibits A-2 to A-12. If the entire property had remained undivided, the plaintiff could not have paid kist separately for a portion of the property. An Advocate Commissioner who had inspected the property at the instance of the plaintiff noticed the existence of live fence (kiluvai fence) along the lines *HABCDF* and *HFE* and referred to this feature in this report and plan, Exhibits C-1 and C-2. Besides the Commissioner also noticed the existence of wells with piccottas, not only in the A Schedule land, but in portions of the B Schedule land also. The wells and the piccottas, though some of the piccottas had become dilapidated, afford indisputable proof to the plaintiff's case that the grazing land had been subsequently converted into cultivable land by some of the sharers including himself and he had made the A Schedule land into a pucca garden land. In such circumstances, the defendants cannot be heard to say that the Subordinate Judge had rendered findings in favour of the plaintiff without adequate material therefor in the plaintiff's evidence.

7. Mr. Doraiswami, learned counsel for the defendants, then contended that, in any event, the plaintiff was not entitled to file an appeal against the judgment and decree of the trial Court since he had been granted the alternative relief prayed for by him in the suit, and, by reason of the decree passed in his favour the plaintiff cannot be considered an aggrieved person. In support of this contention, he cited *Sakku Bai Ammal* v. *Babu Reddiar*[1]. It is, no doubt, true that in the said decision it has been laid down that where a plaintiff asks for relief in the alternative and puts the alternative reliefs on a par with each other, he should be deemed to have made an election even at the threshold and after the grant of one of such alternative reliefs, he is not an aggrieved person who could carry the matter to the higher Court for the grant of that relief which was not given by the trial Court. The ratio contained in the decision cannot apply to the facts of the instant case, because the two prayers made by the plaintiff in the suit cannot be treated as alternative reliefs in the strict sense of the term. Moreover, it can never be said that the plaintiff had placed the second of the prayers on a par with the first prayer. The principal prayer of the plaintiff was that he should be declared entitled to the A Schedule property and that a decree for injunction should also be passed in his favour. The second prayer, which is loosely termed as an alternative prayer, is patently secondary in nature. As the plaintiff himself has stated, the second prayer has been sought for only if the Court, for any reason, found that the plea of partition was not acceptable and the plaintiff will not be entitled to the reliefs of declaration and injunction. Even with reference to the second prayer, the plaintiff had wanted that his right to equities must be recognised and the relief moulded accordingly. In one sense, the plaintiff can well be deemed an aggrieved person, because, the trial Court did not grant the second relief asked for by the plaintiff in the manner in which he wanted it, but only gave him a qualified relief, *i.e.*, a decree for partition without, however, any right to equities. Even if this technical aspect is overlooked there still remains the fact that the plaintiff had not placed the first and second reliefs on par with each other. In this context, it is apposite to refer to the judgment of the Supreme Court in *Ramesh Chandra* v. *Chuni Lal*[1]. That was a case where the plaintiffs sued for specific performance of an agreement of sale or, in the alternative, for return of the advance together with award of damages and the trial Court awarded them the alternative relief. In spite of it, the plaintiffs preferred an appeal for reiterating their claim for specific

1. (1977) 1 M.L.J. 311: 90 L.W. 110: I.L.R. (1976) 2 Mad. 317: A.I.R. 1977 Mad. 223.

1. (1971) 2 S.C.J. 619: (1971) 2 S.C.R. 573: A.I.R. 1971 S.C. 1238.

performance and the Supreme Court held that by reason of the grant of the alternative relief, the plaintiffs were not precluded from agitating for the relief of specific performance, well-known rule that a party cannot approbate and reprobate because, in that case, "the appellants (plaintiffs) had, by consistent and unequivocal conduct, made it clear that they were not willing to accept the judgment of the trial Court as correct". Therefore, it follows that unless a party is shown to have fully approbated to an alternative relief granted to him, he will not stand legally precluded from reprobating the decree and re-agitating his claim for the other relief, which was not given to him. I have already stated that in the present case, the alternative relief of partition asked for by the plaintiff had not been placed by him on par with the main relief of declaration of title and injunction and therefore, the defendants cannot base the contention that the plaintiff was not an aggrieved person and, consequently, his appeal to the lower appellate Court was itself not maintainable and, on that technical ground, the reversing judgment of the lower appellate Court should be set aside by this Court.

8. There being no other point for consideration, it follows that the second appeal has to fail and it will accordingly stand dismissed. But, having regard to the circumstances of the case, *i.e.*, the parties being adjoining land-owners and as such, there should be cordial relationship between them, there will be no order as to costs.

R.S. —— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

M. Palaniappan .. *Appellant**

v.

A. Amsaveni Ammal and others .. *Respondents.*

Arbitration Act (X of 1940), section 34—Scope and applicability—Defendant's silence at the time of commencing arbitration proceedings—Defendant's unwillingness to submit to arbitration not inferable from plea of non-existence of any dispute for resolving by arbitration—Step-in-aid of progrees of suit — What is — Mere existence of arbitration clause brought to notice of Court not to be construed as step-in-aid of the progress of the suit — Duty of Court to afford opportunities to parties for resolving disputes by arbitration — Discretion to be exercised by not granting stay.

Section 34 of the Arbitration Act, confers the right to seek a stay of the suit on a party to the arbitration agreement when the other party commences legal proceedings against him and the appropriate time for invoking that provision would be before the filing of a written statement or the taking of any other steps in the proceedings. The further requirement of the section is that the appellcant under section 34 of the Act should have made apparent his readiness and willingness at the time when the proceedings were commenced and later as well to do things necessary for the proper conduct of the arbitration. A reading of section 34 would indicate that the willingness or readiness of a party to resort to arbitration must be manifested from the time of the commencement of the legal proceedings and throughout the course thereof and the provisions do not require that even at the stage of exchange of notices between the parties prior to commencement of the proceedings, the other party must express his willingness and readiness for arbitration.

[*Para.* 5.]

* A.A.O. No. 19 of 1980. *15th July,* 1980.

It is not possible to accept that silence on the part of the defendant is equivalent to an expression of unwillingness or want of readiness on his part to go to arbitration. Indeed such silence should be normally taken to be consent on the part of the defendant (appellant) for the course suggested by the plaintiff. In the absence of any other material to indicate that the appellant was disinclined to go through the artitration proceeding, mere silence on the part of the appellant cannot be taken to be an indication of his unwillingness to resort to arbitration.

[*Para.* 5.]

Bringing to the notice of the Court the existence of a clause for arbitration and taking time for the purpose of filing an application under section 34 of the Act cannot be construed to be steps--taken-in-aid of the progress of the suit and with a view to submit to the jurisdiction of the Court. In cases where parties have bound themselves by agreement to refer the dispute to arbitration, the Court should, as far as possible afford every opportunity for resolving the disputes by arbitration and the Court's exercise of the discretion to stay or not to stay a suit must be based on a consideration of the totality of the circumstances. [*Para.* 6.]

Case referred to:

State of Punjab v. *Geeta Iron and Brass Works Ltd.*, (1978) 1 S.C.C. 68: (1978) 1 S.C.W.R. 139: (1978) 1 S. C. R. 746: 1978 K.L.T. 37: A.I.R. 1978 S.C. 1608.

Appeal against the order of the Sub-Court, Coimbatore in I.A. No. 555 of 1979 in O.S. No. 572 of 1979.

V. P. Raman, for *N. Srivatsamani*, for Appellant.

O. V. Baluswami, for *K. Sarvabhauman* and *R. Nandakumar*, for Respondents.

The Court made the following

ORDER.—The first defendant in O.S. No. 572 of 1979, Sub-Court, Coimbatore, is the appellant in this Civil Miscellaneous Appeal, which is directed against the order of the Court below dismissing an application filed by the appellant under section 34 of the Indian Arbitration Act, 1940 (hereinafter referred to as the Act) praying for a stay of the suit. The respondents herein instituted that suit for dissolution of the partnership firm M|s. Balasubramania Foundry in which the appellant, the respondents and others are partners and for other consequential reliefs. The partnership came into existence under the terms of the agreement dated 25th November, 1971. *Inter alia,* clause 14 of the agreement provided that "all disputes and questions in connection with the partnership or this deed, arising between the partners or between any one of them and their legal representatives and whether during or after the cessation of the partnership shall be referred to arbitration under the Indian Arbitration Act". Alleging that the claim made in the plaint related to disputes contemplated by the aforesaid clause and therefore, referable to arbitration and that the suit had been filed by the respondents in violation of clause (14) of the partnership agreement, the appellant invoked section 34 of the Act for a stay of the suit.

2. That application was resisted by the respondents herein on the ground that even before the institution of the suit on 24th April, 1979. notices had been sent to the appellant and the appellant did not accept the request of the respondents for arbitration and consequently, the appellant had lost the right to compel the respondents to resort to arbitration for resolving their disputes. In addition, the respondents also put forth the objection that the appellant had taken part in the proceedings by opposing the application for the appointment of a Commissioner and therefore, lost his right to rely upon and invoke section 34 of the Act. On these grounds, the respondents prayed for the dismissal of the application.

3. The learned Subordinate Judge, Coimbatore, who enquired into the application, after referring to the notices, held that the appellant declined to refer the matter to arbitration earlier and therefore, he cannot turn round and say that he is entitled to invoke section 34 of the Act. It was also further held that the appellant had participated in the proceedings in I.A. No. 459 of 1979 on 27th April, 1979 and took time for counter and therefore, had taken a step in the proceedings and thus became disentitled to invoke the provisions of section 34 of the Act. On these conclusions, the Court below dis-

missed the petition. It is the correctness of this order that is challenged in this Civil Miscellaneous Appeal.

4. Mr. V. P. Raman, learned counsed for the appellant, contends that the Court below was in error when it held that the appellant declined to resort to arbitration when called upon by the respondents to do so and had thereby lost the right to invoke the provisions of section 34 of the Act. According to him, at best, it would only be a case of silence on the part of the appellant and that would not in any manner disclose a refusal to abide by the provisions for settling the disputes by arbitration. On the other hand, the learned counsel for the respondents contends that even when the respondents had called upon the appellant to refer the dispute to arbitration, the appellant did not do so and indicated thereby that he was not ready and willing to do all things necessary for the proper conduct of the arbitration as envisaged in the agreement between the parties. In the present case, the existence of the agreement between the parties providing for composing their disputes by arbitration is not in dispute.

5. Section 34 of the Act runs thus—

> "Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings".

This section confers the right to seek a stay of the suit on a party to the arbitration agreement when the other party commences legal proceedings against him and the appropriate time for invoking that provision would be before the filing of a written statement or the taking of any other steps in the proceedings. The further requirement of the section is that the appellant under section 34 of the Act should have made apparent his readiness and willingness at the time when the proceedings were commenced and later as well to do all things necessary for the proper conduct of the arbitration. The objection that has been raised in the present case is that having regard to the stand that has been taken by the appellant to the notices sent by the respondents, the appellant had expressed his unwillingness and want of readiness to go to arbitration and consequently, he cannot invoke section 34 of the Act. In Exhibit A-4 dated 25th July, 1977, the appellant had stated that if necessary, an arbitrator can be appointed for the purpose as envisaged in the partnership deed. This certainly does not express or signify any unwillingness or want of readiness on the part of the appellant to go to arbitration. Exhibit B-4, dated 30th September, 1977 called upon the appellant to refer the matter under dispute for arbitration and also to nominate a person as an arbitrator. Under Exhibit B-5, dated 10th October, 1977, the appellant stated that there is no dispute at all which can form the subject-matter of a valid reference to arbitration and therefore, there was no occasion as such for referring any matter to arbitration. Again, by Exhibit B-6, dated 23rd February, 1978, the respondents called upon the appellant to agree to arbitration within three days from the date of that notice and the appellant did not send any reply whatever. From this, it is sought to be inferred that the appellant was not willing and ready to go on with the arbitration which would disentitle him from invoking section 34 of the Act. It must be remembered that all this correspondence had passed prior to 25th April, 1979, when the suit was instituted. A reading of section 34 would indicate that the willingness or readiness of a party to resort to arbitration must be manifested from the time of the commencement of the legal proceedings and throughout the course thereof, and the provisions do not require that even at the stage of the exchange of notice between the parties prior to the commencement of the proceedings, the other party must express his willingness and readiness for arbitration.

In any event, in the present case, the notices relied upon do not disclose any unwillingness as such on the part of the appellants to resort to and proceed with the arbitration. Even as late as 25th July, 1977, in Exhibit A-4, the appellant had stated that an arbitrator can be appointed for the purpose envisaged in the partnership deed. In Exhibit B-5 dated 10th October, 1977, sent by the appellant, he had stated that there is no dispute which has to be resolved by resorting to arbitration and consequently this cannot be characterised as unwillingness on the part of the appellant to resort to the arbitration procedure provided for in the agreement. The next occasion when the respondents called upon the appellant to abide by the procedure for arbitration was when Exhibit B-6 was issued on 23rd March, 1978. It is not the case of the respondents that to this notice, the appellant expressed his unwillingness and thereby declined to accept the procedure for resolving disputes by resort to arbitration. The attitude of the appellant in regard to Exhibit B-6 was one of silence even as found by the Court below. It is rather difficult to accept that silence on the part of the appellant is equivalent to an expression to unwillingness or want of readiness on his part to go to aribtration. Indeed, such silence should be normally taken to be consent on the part of the appellant for the course suggested by the respondents. In the absence of any other material to indicate that the appellant was disinclined to go through the arbitration procedure, the mere silence on the part of the appellant cannot be taken to be an indication of his unwillingness to resort to arbitration. In *State of Punjab* v. *Geeta Iron and Brass Works Ltd.*[1], the Supreme Court points out that a mere silence on the part of the defendant when a notice under section 80, Civil Procedure Code, is sent to the Government may not, without more, disentitle it to move under section 34 and seek stay. In the light of the above decision, it is not possible to hold that by mere silence the appellant had lost his remedy to invoke section 34 of the Act. Indeed, it is clear that after the commencement of the proceedings, the appellant did not express his unwillingness or want of readiness nor did he decline to refer the matter to arbitration. It is therefore not possible to uphold the conclusion of the Court below that the appellant cannot be permitted to turn round and invoke section 34 of the Act.

6. The next contention of of Mr. V. P. Raman is that when the matter stood posted to 27th April, 1979, a representation was made to the Court that the suit itself is not maintainable as there is a clause in the agreement for referring the dispute to arbitration and that the appellant will also file an application under section 34 of the Act for stay and this would not amount to taking a step in the proceedings. The learned counsel for the respondents, however, contends than even a request as made by the appellant amounts to taking a step in the proceedings. It is necessary to notice the circumstances under which a representation was made on behalf of the appellant and the purpose for which time was asked for in I.A. No. 459 of 1979, filed by the respondents herein which stood posted to 27th April, 1979. Along with the suit, the respondents had filed I.A. No. 459 of 1979 against the appellant wherein they had prayed for the appointment of a Commissioner to look into the accounts and also to file an inventory. The appellant was served with notice of that application on 27th April, 1979, *viz.*, the very same date to which it was posted and that day happened to be the last working day before the commencement of the summer vacation for the Court. In paragraph 6 of the affidavit in support of the application filed by the appellant under section 34 of the Act, the appellant has stated that he entered appearance through his counsel and represented to the Court that the suit itself is not maintainable under the provisions of the Act and that an application under section 34 of the Act for staying the proceedings will be filed. It is also the further stand of the appellant in paragraph 6 that the application could not be filed into Court even on that day, but that it could be put into Court only on the reopening day and the Court took note of these representations and posted I.A. No. 459 of 1979 to the reopening day after the summer recess *viz.*, 11th June, 1979. The appellant had also categorically stated in para-

1. (1978) 1 S.C.C. 68: (1978) 1 S.C.W.R. 139: (1978) 1 S.C.R. 746 : (1978) K.L.T. 37 : A.I.R. 1978 S.C. 1608.

graph 7 that he had not filed his written statement nor had he taken any steps in the suit beyond entering appearance and making the representation referred to earlier. In the counter that has been filed by the respondents, in paragraph 10, the respondents would not deny the representation that had been made on behalf of the appellant on 27th April, 1979, but would nevertheless maintain that a step had been taken in the proceedings, which would disentitle the appellant from prosecuting an application under section 34 of the Act. It is not in dispute that I.A. No. 555 of 1979 under section 34 of the Act had been filed by the appellant on the reopening date, *viz.*, 11th June, 1979. Before the appellant can be held to be disentitled to invoke the benefits of section 34 of the Act, the nature of the step taken by him should be such as to indicate that he has acquiesced in the method of having the dispute decided by the Court and a participation in and contribution to its further progress or has done any act showing acquiescence in the jurisdiction of the Court. In other words, there must be some expression of a desire on the part of the appellant to take a step in the suit indicating that the appellant proposes to go on with the suit and abandon the agreement to refer to arbitration. In the present case, there is a clear manifestaion of a desire on the part of the appellant to take almost the first step to keep alive the arbitration agreement and not to go on with the suit as is evident from the representation made on his behalf and referred to already and which has not been in any manner controverted by the respondents. The representation which was made on behalf of the appellant on 27th April, 1979, was not with a view to take any further step in the proceedings as contemplated under section 34 of the Act, but only with a view to impress upon the Court that in view of the provision contained in the agreement for resolving disputes by resorting to arbitration, the suit as well as the application for the appointment of a Commissioner will not lie. Bringing to the notice of the Court the existence of a clause for arbitration and taking time for the purpose of filing an application under section 34 of the Act cannot in my view, be construed to be steps taken in aid of the progress of the suit and with a view to submit to the jurisdiction of the Court. In cases where parties have bound themselves by agreement to refer the disputes to arbitration, the Courts should, as far as possible, afford every opportunity for resolving the disputes by arbitration and the Court's exercise of the discretion to stay or not to stay a suit must be based on a consideration of the totality of the circumstances. In the present case, the appellant has not in any manner rendered himself unable to invoke the provisions of section 34 of the Act. For the aforesaid reasons, the dismissal of the application filed by the appellant by the Court below is set aside and the Civil Miscellaneous Appeal is allowed with costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *S. Natarajan and S. Ratnavel Pandian, JJ.*

Damodaram Pillai .. *Appellant**

v.

Dhanalakshmi Ammal *alias* **Kuttiammal and others.** .. *Respondents.*

Document — Suit for partition — Nomenclature of document not conclusive — Nature of document to be ascertained from the contents — Intention of executant to be ascertained from the language used.

It is well-settled that the nomenclature given to a particular document by the executant is not conclusive and the naturre or legal character of a document has to be ascertained from the contents thereof. In construing a document, the fundamental rule is to ascertain the intention of the executant from the words used and the other surrounding circumstances appearing in the case. [*Para.* 12]

Cases referred to:—

Ram Gopal v. *Nand Lal*, 1950 S.C.J. 575: 1950 S.C.R. 766 : 64 L.W. 547 : A.I.R. 1951 S.C. 139; *Abdulla Ahmed* v. *Animendra Kissan Mitter*, 1950 S.C.J. 153 : 1950 S.C.R. 30 : A.I.R. 1950 S.C. 15; *Chinnathayi* v. *Kulasekara*, 1952 S.C.J. 1 : (1952) 1 M.L.J. 292 : 65 L.W. 1167 : 1952 S.C.R

*A. S. Nos. 403, 404 of 1976 and 720 of 1977.
25th March, 1960.

241 : A.I.R. 1952 S.C. 29; *Pandit Chunchun Jha* v. *Sheikh Ebabat Ali*, 1954 S.C.J. 469 : (1954) 1 M.L.J. 708 : (1955) 1 S.C.R 174 : A.I.R. 1954 S.C. 345; *Khivraj Chordia* v. *Esso Standard Eastern Inc*, (1975) 2 M.L.J. 65 : 88 L.W. 470 : A.I.R 1975 Mad. 374; *Central Bank of India* v. *Hartford Fire Insurance Company*, (1965) 1 Comp.L.J. 226: 35 Comp. Cases. 378 : (1965) 1 S.C.J. 498 : A.I.R. 1965 S.C. 1288; Ex parte *Chick, Meredith*, In re, (1879) 11 Ch.D.731; *Ramaswami Naidu* v. *Velappan*, (1979) 2 M.L.J. 88; *Amar Singh* v. *Gosai*, A.I.R 1972 Guj. 74; *Khushal Chand Bhagchand* v. *Trimbak Ramachandra*, A.I.R. 1949 Bom.49; *Ignatia Brito* v. *Rego*. (1933) 64 M.L.J. 650 : 37 L.W. 716 : A.I.R. 1933 Mad. 492; *Mahadeva Iyer* v. *Sankarasubramania Iyer*, (1908) 18 M.L.J. 450; *Papathi Ammal* v. *Doraiswamy Naicker*; (1939) 1 M.L.J.337: 48 L.W. 764 : A.I.R. 1939 Mad. 290; *Kalyanasundaram Pillai* v. *Karuppa Mooponar*; (1927) I.L.R. 50 Mad. 193 : 52 M. L.J. 346 : 25 L.W. 336 : 54 I.A. 89 : A.I.R. 1927 P.C. 42; *Mt. Anandi Devi* v. *Mohan Lal*, (1932) All.L.J. 335 : I.L.R. 54 All. 534 : A.I.R. 1932 All. 444; *Muhamed Abdul Nayeem* v. *Jhonti Mahton*, (1917) 41 I.C. 389; *Krishna Murthi v. Venkata Ramanaiah*, (1958) 2 An.W.R. 343: A.I.R. 1958 A.P.213; *Venkataramayya v. Nagamma*, (1932) 35 L.W. 233: A.I.R 1932 Mad.272; *Kalandiyil Ammal v. Changaran*, A.I.R. 1963 Ker.344; *Narayani Bhanumathi v. Lalitha Bai*, 1973 K.L.T 961.

A.S. No. 403 *of* 1976 *and* 404 *of* 1976.—Appeal againt the decree of the Court of Subordinate Judge, Chingleput, dated 27th February, 1976 and passed in C.R.O.R. Nos. 245 and 192 of 1974 and dated 20th January and passed in 1968 C.R.O.P.No. 275 of 1966 respectively.

Govind Swaminathan, for Appellant.

The Judgment of the Court was delivered by

Ratnavel Pandian, J. — A.S.Nos. 403 of 1976 and 404 of 1976 are preferred by one Damodarm Pillai, who is the first claimant in C.R.O.P.No. 245 of 1974 and the first defendant in O.S.No. 192 of 1974, both on the file of the Court of the Subordinate Judge, Chingleput, questioning the validity and correctness of the common judgment rendered by the Additional Subordinate Judge Chingleput in the said C.R.O.P. No. 245 of 1974 and O.S No. 192 of 1974.A.S.No.720 of 1977 is another appeal preferred by the abovesaid Damodaram Pillai against the order of the Court of the Subordinate Judge of Chingleput made in C.R.O.P. No. 275 of 1966. Originally, an appeal as against the order in C.R.O.P. No. 275 of 1966 was filed before the District Court, Chingleput in A.S. No. 103 of 1968. Subsequently it was transferred by the orders of this Court, to this Court for being heard along with the other connected appeals A.S.Nos.403 and 404 of 1976, and then renumbered as A.S. No.720 of 1977, since the subject-matter involved and the parties interested in the disputes are the same in all the proceedings.

2. O.S.No.192 of 1974 giving rise to A.S.No. 404 of 1976, is a suit filed by the plaintiff Dhanalakshmi Ammal *alias* Kuttiammal, for partition and separate possession of the plaint schedule properties into two equal shares and for allotment of one such share to the plaintiff and for directing the defendants to pay a sum of Rs.2,625 being the damages for use and occupation pertaining to the half share of the plaintiff for the period 1973-74 and to render an account of the income from the properties till delivery of possession and of costs.

3. The facts of the case in the above suit can be succinctly stated as follows: One Vembuli Pillai had two wives *viz.*, Thayarammal and Krishnammal. Through Thayarammal, Vembuli had a a son Thambu Pillai, whose son is the first defendant Damodaram Pillai. Vembuli through his second wife Krishnammal. had one son, *viz.*, Shanmugham, who died issueless in 1948 within a short period after his marriage in 1946 and two daughters Jayalakshmi Ammal and Kannammal Jayalakshmi, the first daughter of Krishnammal was given in marriage to Damodaram Pillai and she died in 1940 leaving behind her two sons, Balraj who died in 1952 and Natarajan who also died in 1957. Kannammal was given in marriage to Damodaram Pillai as his second wife and she too died in 1941 surivied by her daughter Dhanalakshmi Ammal *alias* Kuttaimmal, the plaintiff in the suit (who was also the second claimant in C.R.O.P. No. 245 of 1974 as well as in C.R.O.P.No 275 of 1966). The abovesaid Krishnammal, the maternal grandmother of the plaintiff, to whom the plaint schedule property originally belonged, executed a

Settlement deed Exhibit B-1, dated 15th October, 1956 settling all the schedule properties in favour of her grand-children, the plaintiff and Natarajan. As per the terms and conditions of Exhibit B-1, the settlor Krishnammal had to enjoy the income from the properties till her lifetime and thereafter the settlees were to enjoy the properties absolutely. As pointed out above, Natarajan died in 1957 hardly within a year after the execution of Exhibit B-1. The settlee Krishnammal died on 6th March, 1973. Consequent upon the death of Natarajan, Damodaram Pillai succeeded to the half share of Natarajan, whilst the plaintiff was entitled to the other half share by virtue Exhibit B-1. A portion of the property, (*i.e.*) an extent of 74 cents comprised in S.No. 75/1-B covered by Exhibit B-1, was acquired by the Government and the compensation for the same was deposited into Court under section 30 of the Land Acquisition Act. Damodaram Pillai contended that what was executed by Krishnammal under Exhibit B-1 was only a will and not a settlement, that Krishnammal had subsequently executed a settlement deed Exhibit B-2 dated 4th April, 1964, in his favour settling all her properties on him and cancelling or revoking Exhibit B-1, and that therefore he alone would be entitled to the entire compensation. The learned Subordinate Judge of Chingleput held an enquiry into the matter in C.R.O.P.No. 275 of 1966, in which Krishnammal, Dhanalakshmi Ammal (the plaintiff) and Damodaram Pillai were arrayed as the first, the second and the fifth claimants respectively along with two others, and found, rejecting the contentions of Damodaram Pillai, that Exhibit B-1 was only a settlement deed and not a will and as such the plaintiff would be entitled to a half share of the compensation amount deposited in Court. According to the plaintiff, Exhibit B-2 has been created by her father by practising fraud on Krishnammal who had no disposing power over the property and who had not reserved the right of revocation in Exhibit B-1. Since the second defendant had claimed to be a lessee under the first defendant, the plaintiff has also impleaded him as a party to this action. As Damodaram Pillai was not willing to divide the properties into equal shares and to allot one such share to the plaintiff, she filed the suit.

4. The first defendant resisted the suit claim, *inter alia* contending that Exhibit B-1 is testamentary in character and not a settlement and that no immediate interest was created in favour of the settlees as the settlor herself continued to be in possession and enjoyment of the properties and that title to the disputed items of properties was not divested from Krishnammal and vested in the plaintiff. He would further state that Krishnammal had vested the title in this defendant pursuant to the execution of Exhibit B-2, by and under which Krishnammal had revoked Exhibit B-I and settled the properties in his favour and handed over possession thereof. According to him, the reference made in the plaint to the order in C.R.O.P.No. 275 of 1966 is irrelevant as this defendant has preferred an appeal against that order before the District Court in A.S.No.103 of 1968, which was then pending the District Court, Chingleput. (It is to be noted that the said A.S.No. 103 of 1968 is now transferred and has been renumbered as A.S.No.720 of 1977 in this Court). This defendant therefore has got the right to lease the properties and hence he is not liable to pay half the income to the plaintiff or to render any account of the income.

5. The second defendant filed a separate written statement denying any knowledge of the execution of Exhibit B-1. According to him, he has become a lessee *bona fide* under the first defendant on executing a registered lease deed Exhibit B-5, dated 1st September, 1967 and has expended a sum of Rs. One lakh for putting up a semi-permanent theatre and is willing to pay the lease amount to whomsoever the Court directs.

6. C.R.O.P.No.245 of 1974 is a reference under sections 30 and 31 (2) of the Land Acquisition Act, which has given rise to A.S.No. 403 of 1976. This relates to a dispute between the rival claimants Dhanalakshmi Ammal and Damodaram Pillai, *viz.*, the plaintiff and the first defendant in O.S.No. 192 of 1974 with respect to some of the items of properties acquired by the Government, *viz* 10 cents in S.No. 65, 1 acre 27 cents in S. No. 67/1, and 1 acre in S.No. 67/2 in Nandambakkam Village, Saidapet Taluk, in Award No. 1 of 1974 and with respect to Damodaram Pillai's claim of the entire compensation amount awarded. Thus, whilst Damodaram Pillai would claim the entire compensation amount on the basis of Exhibit B-2, Dhanalakshmi

would claim a half share in the compensation amount on the basis of Exhibit B-1.

7. Since a common question of law is involved both the suit and the C.R.O.P. were jointly tried and a common judgment was rendered by the trial Judge holding that Exhibit B-1 is only a settlement and not a will that Exhibit B-2 is not valid, though true, that Damodaram Pillai had no right to lease out the entire second item of the property to the second defendant, that the plaintiff is entitled to a decree for Rs. 2,625 towards her half share in the rental income from item 2 which the first defendant was directed to pay, he having collected the same from the second defendant, and that the plaintiff was also entitled to a decree for an account of the future profits and that the second defendant should pay half of the rent to the plaintiff. On the abovesaid findings, the trial Court granted a preliminary decree in favour of the plaintiff as prayed for with costs, in O.S.No. 192 of 1974.

8. In view of the finding on Issue 1 in O.S. No. 192 of 1974, the learned Subordinate Judge gave a declaration that each of the claimants in C.R.O.P. No. 245 of 1974 is entitled to a half share in the compensation amount less the process fee.

9. A.S. No. 720 of 1977 is filed by Damodaram Pillai, the fifth claimant in C.R.O.P. No. 275 of 1966 challenging the order of the Subordinate Judge that Exhibit B-1, is a settlement and not a will and as such Dhanalakshmiammal, the second claimant therein, was entitled to a half share in the compensation deposited in Court towards the value of the acquired properties, *viz.*, 74 cents in S.No. 75/1-B.

10. As the decision in all these three appeals has to rest only on the determination of certain common legal questions, we have decided to render a common judgment. The common questions that arise for our consideration are:

1. Whether Exhibit B-1 is a settlement or a will.

2. Even assuming that Exhibit B-1 is a settlement whether the settlee Dhanalakshmi Ammal has accepted the settlement for holding that the transaction in dispute was completed.

11. We shall first of all examine Exhibit B-1 and see whether it is a testamentary or a non-testamentary instrument. A careful scrutiny of the document would show that the settlor Krishnammal has sytled and characterised Exhibit B-1 as a settlement at several places in the body of the document and had executed the same in favour of her grand-children born through her two daughters, with a specific recital that only both the settlees are entitled to the properties but on a condition that the settlor had to enjoy the income out of the properties during her lifetime and thereafter the settlees could enjoy the properties with absolute powers of alienation. The relevant recital reads as follows :

> "நான் இச்சொத்துக்களில் வரும் வருமானங்களை என் ஜீவதிசை வரையில் நான அடைந்து பிறகு மேல் கண்ட 1, 2 லக்கமிட்டவர்கள் சர்வ சுதந்திரமாய் தானாதி வினிமய விக்கிரியங்களுக்கு யோக்கியதையாய் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது......இதில் கண்ட 1, 2 லக்கமிட்டவர்கள் இச் சொத்துக்கு பாத்யம்".

A meticulous analysis of the above recital unfolds that the settlor had intended to vest the title to the property on the settlees *in praesenti* but to postpone the enjoyment of the properties by the settlees till the settlor's death, and hence she would characterise the document as a settlement.

12. It is well-settled that the nomenclature given to a particular document by the executant is not conculusive and the nature or legal character of a document has to be ascertained from the contents thereof. In construing a document, the fundamental rule is to ascertain the intention of the executant of the document from the words used and the other surrounding circumstances appearing in the case vide *Ram Gopal* v. *Nand Lal and others*[1]. See also *Abdulla Ahmed* v. *Animendra Kissan Mitter*[2] and *Chinnathayi* v. *Kulasekara*.[3] Reference can also be made to the decision of the Supreme Court in *Pandit Chunchun Jha* v. *Sheikh Ebabat Ali*[4] where-

1. 1950 S.C.J. 575: 64 L.W. 547: 1950 S.C.R. 766: A.I.R. 1951 S.C. 139.
2. 1950 S.C.J. 153 : 1950 S.C.R. 30 : A.I.R. 1950 S.C. 15.
3. 1952 S.C.J. 1: (1952) 1 M.L.J. 292: 65 L.W. 1167: 1952 S.C.R. 241: A.I.R. 1952 S.C. 29.
4. 1954 S.C.J. 469: (1954) 1 M.L.J. 708: (1955) 1 S.C.R. 174: A.I.R. 1954 S.C. 345.

in it has been pointed out that while interpreting the terms of a document, the intention of the parties should be taken as the determining factor and that the said intention must be gathered from the document itself which has to be construed for finding out the legal effect of the word used by the parties. It is further pointed out that if the words are express and clear, effect must be given to them, that any extraneous enquiry into what was thought or intended is ruled out and that if, however, there is ambiguity in the language employed, then it is permissible to look into the surrounding circumstances to determine what was intended and that each case has to be decided on its own facts and each document has to be construed on its own terms. A Division Bench of this Court, to which one of us was a party in *Khivaraj Chordia* v. *Esso Standard Eastern Inc.*[1], while examining the principle to be followed in interpreting documents, has held that notwithstanding the restrictions and calculations imposed by operation of technical rules, a liberal construction of a written document is to be made because of the simplicity of the laity and with a view to carry out the intention of the parties and affirm the document and that the words used in written instruments ought to be made subservient, not contrary to the intention of the parties. The Supreme Court in *Central Bank of India* v. *Hartford Fire Insurance Company*[2], has po inted out that the Court must give effect to the plain meaning of the words used in the document, however it may dislike the result, and that the plaint and categorical language used in any document cannot be radically changed by relying upon the surrounding circumstances. Thus, it is clear that the intention of the parties has to be gathered and ascertained first of all only from the language used in the instrument as understood in its plain, ordinary and popular sense, and if the words are express, clear and unambiguous, effect should be given to them without subjecting them to any extraneous enquiry. In *Ex parte Chick, In re, Meredith*[3] Brett, L. J. following the rule of construction laid down in the earlier cases, has stated that in construing instruments one must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used.

1. (1975) 2 M.L.J. 65: 88 L.W. 470: A.I.R. 1975 Mad. 374.
2. (1965) 1 Comp. L.J. 226: 35 Comp. Cas. 378: (1965) 1 S.C.J. 498: A.I.R. 1965 S.C. 1288.
3. (1879) 9 Ch. D. 731.

12. A Division Bench of this Court in *Ramaswami Naidu v. Velappan and others*[1] has laid down the following important tests in deciding a document, as to whether it is a settlement or a will :

1. The nomenclature used by the settlor in sytling the document;

2. The express dispositive words used which touch upon the time when the vested interest is created;

3. The reservation of the power of revocation in the instrument;

4. The effect of the reservation of a life estate in favour of the executant under the instrument ;

5. Registration of the document under the appropriate law.

Now, if we examine Exhibit B-1 in the light of the above authoritative enunciations of law pronounced by the Supreme Court and the various High Courts, we are of the view that all the necessary and requisite ingredients and conditions for constituting a document a settlement are satisfied in this case and therefore the settlor Krishnammal had intended to create Exhibit B-1 only as a settlement and not as a will. Exhibit B-1 is written on stamp papers requisite to the value of the settlement deed and registered. The settlement, in unequivocal and clear, terms, had expressed her intention to vest the title in respect of the property on the settlees *in praesenti* though she postponed the enjoyment to a later date. It is unambiguously stated in Exhibit B-1 in three places that both the settlees should get the properties in equal shares (*சமபாகமாக அடைய வேண்டியது.*) What the settlor had reserved for herself during her lifetime was only the right to get the income out of the settled properties, and not the corpus. Further, there is yet another recital in Exhibit B-1 revealing the intention of the settlor, reading as follows:

1. (1979) 2 M.L.J.

"இதில் கண்ட 1, 2 லக்கமிட்டவர்கள் இச் சொத்துக்கு பாத்தியம் எனக்த வாரிசு உள்ளவர்கள்".

As pointed out in *Amar Singh* v. *Gosai*[1].

"Whether an instrument is a testamentary instrument or a non-testamentary one will depend on the two well-known tests, whether by the said instrument disposition takes effect during the lifetime of the executant of the instrument or whether it takes effect after his demise, and consequently whether it is revocable or not."

Reference can also be had to the decision in *Khushalchand Bhagchand* v. *Trimbak Ramachandra*[2], wherein it was held as follows :

"The mere reservation of a life estate does not necessarily indicate that the document is testamentary and that, therefore, the grant is revocable."

See also *Ignatia Brito* v. *Rego*[3] and *Mahadeva Iyer* v. *Sankarasubramania Iyer*.[4] The subsequent conduct of the settlor and the settlee also reveals that there was an immediate vesting of title on the settlees and that the parties in the acquisition proceedings have acted only as per the terms of Exhibit B-1. Krishnammal, the first claimant in C.R.O.P.No.275 of 1966 in all her statements given before the Land Acquisition Officer, marked therein as Exhibits B-3 (dated 22nd January, 1961) B-4 (dated 22nd February, 1961), B-5 (dated 18th June, 1962), B-1 (dated 17th July, 1962), B-7 (dated 27th March, 1963) and A-6 (dated 27th August, 1964), and in her evidence given before the learned Subordinate Judge in the said proceedings, has affirmed and reaffirmed her intention in clear terms that only her grand-daughter the plaintiff would get her properties. Krishnammal had not only expressed her intention of vesting the title on the plaintiff but also would go one step further and say in Exhibits D-3 D-4 and B-5 marked in C.R.O.P.No. 275 of 1966 that since by then Natarajan, another settlor, had passed away, the entire properties covered by Exhibit B-1 should go only to the plaintiff and Damodaram Pillai had no right or title over the properties in any manner. Though in Exhibit B-7 marked in the proceedings in C.R.O.P.No.275 of 1966, the entire compensation has been claimed, in paragraph 9 of Exhibit B-7 she would state as follows:

'That Dhanalakshmi Ammal *alias* Kutti-ammal, the grand daughter of the claimant by her daughter Kannammal (the second wife of Damodaram Pillai) will be entitled to one half of the compensation amount absolutely after the life time of the claimant as per the terms and conditions of the settlement deed executed by this claimant hereinbefore referred to."

Thus, it is seen that Krishnammal, though would claim the entire compensation, would unhesitatingly recognise the right of the plaintiff to a half share in the corpus or the compensation amount, subject to the condition that she would be entitled to get the said amount after the lifetime of the settlor.

13. Exhibit A-6, the other statement given by Krishnammal before the Land Acquisition Officer in the said proceedings in C.R.O.P. No.275 of 1966, is an important and clinching document showing that Krishnammal had completely ignored Exhibit B-2 and reiterated only what she had intended under Exhibit B-1. This statement Exhibit A-6 was given on 27th August, 1964, that is to say, four months after the execution of Exhibit B-2 dated 2nd April, 1964. In Exhibit A-6, Krishnammal would state:

"நான் இந்த புலனை எனது பேத்தி தனலக்ஷ்மி அம்மாள் பேரிலும், பேரன் நடராஜன் பேரிலும் செட்டில்மெண்டு எழுதி வைத்திருக்கிறேன். நடராஜன் இறந்துவிட்டார். எனக்கு பிறகுதான் இந்த பலன் பூராவும் எனது பேத்தி தனலக்ஷ்மி அம்மாளுக்கு சேரவேண்டியது. ஆகையினால் இந்த புலன் பூராவும் எனது பேத்தி தனலக்ஷ்மி அம்மாளுக்கு சேர வேண்டியது. நான் இத்துடன் நான் எழுதிவைத்திருக்கும் தான செட்டில்மெண்டின் நகலை தாக்கல் செய்திருக்கிறேன்".

If Krishnammal had really intended to revoke Exhibit B-1 and resettle the property in favour of her son-in-law Damodaram Pillai, she would not have omitted to make mention of Exhibit B-2 in this statement but would have expressed her intention that only Damodaram Pillai would get the properties. Thus, it is clearly established that the settlor, by her subsequent conduct in Exhibits B-1 and B-2, also had, intended to

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1. A.I.R. 1972 Guj. 74, 76, 77.
2. A.I.R. 1947 Bom. 49.
3. (1933) 64 M.L.J. 650 : 37 L.W. 716 : A.I.R. 1933 Mad. 492.
4. (1908) 18 M.L.J. 450.

settle the property in favour of Dhanalakshmi Ammal, by immediately vesting the title on the settlee, but postponing only the enjoyment of the property.

14. For all the above stated reasons, we unhesitatingly hold that Exhibit B-1 is only a settlement and not a will and affirm the finding of the trial Court on the first question.

15. At this juncture, it would be relevant to mention that Mr. Govind Swaminathan, learned counsel appearing on behalf of the appellant, in fact did not advance any serious argument challenging the finding of the trial Court that Exhibit B-1 is only a settlement, though at the same time had not completely conceded the correctness of the said finding. The main contention of Mr. Govind Swaminathan, is that the transaction has not been completed as there is no acceptable evidence showing that the settlement has been accepted by the settlee during the lifetime of the settlor, as contemplated under section 122 of the Transfer of Property Act, Mr. Govind Swaminathan, stressing on the important condition of a gift specified in the above section, *viz*, the acceptance of the gift by or on behalf of the donee during the lifetime of the donor, would urge that the said essential element has not been satisfied in the present case as there is no satisfactory and acceptable evidence on the side of the plaintiff that she or anyone on her behalf had accepted the settlement during the lifetime of Krishnammal, and therefore the impugned transaction under Exhibit B-1 cannot be said to have been completed within the meaning of section 122 of the Transfer of Property Act. He would also bring to our notice that the trial Court has not framed any issue on this aspect or rendered any finding as to the acceptance of the gift. According to the learned counsel, as Krishnammal continued to be in possession of the property, there was no vesting of title *in praesenti* on the settlees and as Exhibit B-1 has been revoked by Exhibit B-2, it has to be held that Exhibit B-1 is no more in effect. The learned counsel would therefore submit that in case this Court does not accept the above argument, this Court may be pleased to direct the Court below to frame an issue on this aspect and to render a finding.

16. Before launching a discussion on the legal question as to whether the transaction under Exhibit B-1 is void or not, we would like to answer the last submission made by the learned counsel.

17. While discussing the first question formulated by us, *viz.*, whether Exhibit B-1 is a settlement or a will we have given our reasons elaborately and held that the settlor Krishnammal had vested the title over the suit items of properties on the settlees Dhanalakshmi Ammal and Natarajan on the date of the execution of Exhibit B-1 itself that is to say *in praesenti* though she had reserved to herself the right of enjoying the fruits of the corpus during her lifetime and thereby postponed the right of the settlees to enjoy the properties. Therefore, there is no question of Exhibit B-1. becoming ineffective or inoperative on the ground of there being no vesting of title *in praesenti* on the settlees.

18. Now, we shall pass on to the important question of law raised by Mr. Govind Swaminathan. Section 122 of the Transfer of Property Act reads as follows:

> "Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another called the donee, and accepted by or on behalf of the donee.
>
> Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void".

Sections 122 to 129, coming under Chapter VII of the Act, under the heading "Of Gifts" deal with various aspects of a gift, *viz.*, regarding the effect of transfer, suspension and revocation of gift, etc. Section 122, which defines a 'gift' contemplates the acceptance of the gift by or on behalf of the donee during the lifetime of the donor, as one of the elements for holding the said transaction as a completed one. Mr. Govind Swaminathan, in support of his argument, relied on the decision in *Papathi Ammal* v. *DoraiswamyNaicker*[1], which in turn follows the decision of the Privy Council in *Kalyanasundaram Pillai* v. *KaruppiahMoopanar*[2]. In the

1. (1939) 1 M.L.J. 337 at 338: 48 L.W. 764: A.I.R. 1939 Mad. 290.
2. (1927) I.L.R. 50 Mad. 193: 52 M.L.J. 346: 25 L.W. 336: 54 I.A. 89: A. I.R. 1927 P.C. 42.

above decision, it has been held that a gift of immovable property which has not been accepted by the donee is incomplete, though the deed of gift has been executed and duly registered by the donor; that the donor is entitled to revoke the gift prior to its acceptance by the donee, and that registration would not confer upon any invalid transfer a validity which is lacking in the very substance of the transaction.

19. There cannot be any controversy that acceptance of a gift by the donee is one of the essential conditions for the completion of the gift. Therefore, the question in this case is whether the settlement had been accepted by the plaintiff. Mr. Raghavan, learned counsel appearing on behalf of the respondents, submitted that there is abundant evidence for concluding that the settlement had been accepted by the plaintiff as seen from the evidence of the plaintiff herself even in the proceedings in C.R.O.P. No. 275 of 1966 as C.W.2 in December, 1977 when Krishnammal, the settlor herself was alive, and from the recitals in the various documents. Incidentally, Mr. Raghavan would point out that Damodaram Pillai, the first defendant, as appellant in A.S. No. 720 of 1977, has not taken up in the memorandum of appeal therein the ground that the said finding in C.R.O.P. No. 275 of 1966 rendered by the Subordinate Judge, Chingleput, is vitiated as there is no evidence as to the acceptance of the settlement, and would further submit that there is no issue framed on this question of acceptance, by the trial Court, presumably for the reason that the first defendant did not press this ground seriously before the trial Court, nor did he request the trial Court to frame such an issue perhaps on account of the awareness of the first defendant of the fact of the acceptance of the settlement by the plaintiff even during the lifetime of Krishnammal.

20. Though in the Memorandum of Appeal in A.S. No. 720 of 1977 no such ground has been urged, nevertheless ground No. 5 in A.S. No. 404 of 1976 is to the effect that Exhibit B-1 is not a valid document as a gift as it was not accepted by the plaintiff or anyone on her behalf during the lifetime of Krishnammal. Whether there was any ground taken in the Memorandum of appeal or not, there cannot be any bar for the contesting party to raise a legal question during the hearing of the appeal if that legal question relates to an infirmity surrounding the transaction and going to the very root of it. Notwithstanding the fact that such a ground has not been taken in A.S. No. 720 of 1977 and that no issue was also set for trial in the suit, we shall now examine the evidence and see whether Exhibit B-1 was accepted by the plaintiff or not immediately after its execution.

21. As pointed out during the narration of the facts, Natarajan, the other settlee under Exhibit B-1, died within a year. The remaining settlee was only the plaintiff who, during the execution of Exhibit B-1 should have been aged about 21 or 22 and hence under the protection of her father and grandmother Krishnammal. Therefore, it cannot be said that the failure to effect the mutation of the registers in the name of the plaintiff immediately following the execution of Exhibit B-1 would be tantamount to non-acceptance of the settlement by her. It is quite understandable that the plaintiff, being an unmarried woman, would not have taken steps for the mutation of the registers in her name. Now, we have to see whether, apart from the mutation of register, there is any satisfactory and acceptable evidence in proof of the acceptance of the settlement, as contemplated under section 122 of the Transfer of Property Act.

22. Section 122 of the Transfer of Property Act, does not contemplate any particular mode of acceptance or the performance of any solemn formality for establishing acceptance. The Privy Council in *Kalyanasundaram Pillai* v. *Karuppiah Moopanar*[1], while examining the scope of section 122, has held at page 200, as follows :—

> "When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective".

In *Mst. Anandi Devi* v. *Mohan Lal*[2], it was held that under section 122 of the Transfer of Property Act there is no presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee,

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1. I.L.R. (1927) 50 Mad. 193 : 52 M.L.J. 346 : 25 L.W. 336 : 54 I.A. 89.
2. 1932 All. L.J. 336 : I.L.R. 54 All. 534 : A.I.R. 1932 All. 444.

that there is nothing in section 122 to limit the acceptance to an express acceptance and that acceptance may be either express or implied, and that actual or constructive possession is undoubtedly proof of acceptance.

23. The Patna High Court in *Muhamed Abdul Nayeem* v. *Jhonti Mahton*[1], has ruled thus (*vide* head-note) :

> "Among Hindus gifts made subsequent to the Transfer of Property Act do not require delivery of possession if there is registration. It is essential to a Hindu gift that there should be acceptance by the donee. But acceptance may be express or implied, acceptance being presumed unless dissent is signified".

In Halsbury's Laws of England, IV Edition, Volume 20, at page 28, paragraph 47, it is stated as follows :

> "Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of the gift. This is so even where the gift is of an onerous nature or of what is called 'an owner's trust' ".

In *Krishnamurthi* v. *Venkata Ramanaiah*[2], the Andhra Pradesh High Court, while dealing with a similar question as to what constitutes the acceptance of a gift, has observed that the acceptance of a gift deed is not something which has necessarily to take place only after the transfer is completed or effected, and that if a near relation seeks a gift and a gift deed is drawn because of that request, it would be open to the Court to hold on the basis of that antecedent request at any rate in the light of the surrounding circumstances that the intended transfer of property was accepted. It was further observed that the law does not require that there should be proof that there was acceptance only after the deed was executed and that there can merely be cases where it would be possible to draw an inference as to the acceptance of a gift even from acts anterior to the execution of a deed of gift.

1. (1917) 41 I. C. 389.
2. (1958) 2 An.W.R. 343 : A.I.R. 1958 A.P. 213.

24. In *Venkataramayya* v. *Nagamma*[1], this Court held that where a gift is made of a house by the mother to her son and his wife, while they were both minors, and afterwords the donees and the husband's parcants, who alone could accept the gift on behalf of the minors, continued to live in the house, acceptance of the gift should be inferred unless the contrary is proved, and that the mere circumstance that the mother retained custody of the deed and kept the house in her name in the Municipal accounts and paid the taxes, does not show that she did not intend the gift to be acted upon.

25. The Kerala High Court, in *Kolandivel Ammal* v. *Changaran and others*[2], held that where the recitals in a deed of gift clearly showed that the property was then outstanding with tenants and what remained with the donor was only the right to collect rent from them, and that right to collect rent was transferred to and accepted by the donee under the terms of the gift, there was acceptance of the gift by the donee.

26. In another decision in *Narayani Bhanumathi* v. *Lalitha Bai*[3], the Kerala High Court while examining the evidence required for proof of acceptance of a gift as contemplated under section 122 of the Transfer of Property Act, has held thus:

> "The evidence bearing on the question of acceptance of the gift deed will have to be appreciated in the background of the circumstance relating to the execution of such a deed. There may be cases where slightest evidence of such acceptance would be sufficient. There may be still cases where the circumstances themselves eloquently speak to such acceptance. Normally, when a person gifts properties to another and it is not an onerous gift, one may expect the other to accept such a gift when once it comes to his knowledge since normally any person would be only too willing to promote his own interests. May be in particular cases there may be peculiar circumstances which may show that the donee would not have accepted the gift. But they are rather the exceptions than the rule. It is only normal

1. (1932) 35 L.W. 233 : A.I.R. 1932 Mad. 272.
2. A.I.R. 1963 Ker. 344.
3. 1973 K.L.T. 961.

to assume that the donee would have accepted the gift deed. One would have to look into the circumstances of the case in order to see whether acceptance could be read. Mere silence may sometimes be indicative of acceptance provided it is shown that the donee knew about the gift. Essentially, this is a question of fact to be considered on the background of circumstances of each case."

Thus, on a consideration of the dicta laid down by the various Courts in the cases referred to above and on our own interpretation of section 122 of the Transfer of Property Act, we are of opinion that the acceptance of the gift may be done in several ways. As we have already stated, section 122 does not lay down any procedure or prescribe any mode for the acceptance of a gift. The acceptance may take the form of the receiving of the original deed of settlement for the donee, the mutation of names in the public registers, the payment of taxes in the name of the donee, the receipt of rent from the tenants in possession of the property forming the subject-matter of the gift, the proclamation of the settlement transaction by the donor and an acceptance by the donee of the correctness of the said statement in token of the acceptance of the transaction, etc. The several instances referred to above by us are only enumerative and not exhaustive in character and content. In this perspective if the facts of the present case are scrutinised, we feel that there is sufficient material for arriving at the conclusion that the gift had been accepted. The plaintiff as C.W.1 has deposed before the Subordinate Judge in the enquiry in C.R.O.P. No. 275 of 1966 as follows:

"I accepted the settlement".

This evidence given in the chief examination has not been challenged in her cross-examination, nor has any suggestion been made to her that she has not accepted the settlement. In her evidence, she would further state that she was living with her grandmother Krishnammal and that Krishnammal was enjoying the income of the property settled, utilising the said income for maintaining herself and the plaintiff. Damodaram Pillai, giving his evidence as C.W.1 in that proceeding, would state that Krishnammal, the first claimant therein, continued to be in enjoyment of the properties and that Damodaram Pillai was looking after the properties and that at the time of the execution of Exhibit B-1, the plaintiff was a major but not married and that she was residing with him and Krishnammal and was married only in 1959. He would further state in the Chief Examination itself that Krishnammal, the settlor, told the Tahsildar during the land acquisition proceedings that the compensation amount was payable to her grand-daughter, the plaintiff herein. Thus, Damodaram Pillai himself would admit that the settlor had continued to express her intention that the compensation amount deposited in the Court should go only to the plaintiff.

27. Thus, we see that there is satisfactory evidence to show that the settlor was affirming and re-affirming her intention on all occasions that the property and the compensation amount payable in respect of the acquired property should go only to the plaintiff and that the plaintiff had accepted the settlement in her favour. The plaintiff, in her statement filed on 9th October, 1966, before the learned Subordinate Judge, Chingleput in C.R.O.P. No. 275 of 1966, has averred as follows :

"The settlement deed so executed by Krishnammal was accepted by this claimant and Natarajan and they were in possession and enjoyment".

The only statement on which Damodaram Pillai relies for showing that Krishnammal herself has expressed that the plaintiff did not at all accept the settlement, is the one filed by Damodaram Pillai on 1st October, 1966, in C.R.O.P. No. 275 of 1966, which statement is purported to have been adopted by Krishnammal. In that statement it has been stated as follows :

"Krishnammal having been subjected to undue influence of some interested person purported to have executed a will in respect of all the properties bequeathing them in favour of Natarajan and Dhanalakshmi on 15th October, 1956. Although it has been styled as settlement deed, it was only a will. Notwithstanding the execution of the above said instrument, Krishnammal continued to be in possession and enjoyment of all the lands. Natarajan and Dhanalakshmi did not at all accept the alleged settlement, nor did it come into operation".

The above statement is nothing but a self-serving statement of Damodaram Pillai himself. The endorsement to the effect that Krish-

nammal had adopted the last mentioned statement of Damodaram Pillai in its entirety has not been signed by Krishnammal, but only by the counsel, and therefore it cannot be said that Krishnammal herself had admitted the correctness of the statement with full knowledge of the allegations contained therein. We are fortified in this view by the statement given by Krishnammal herself before the Land Acquisition Officer on 27th August, 1964, marked as Exhibit A.6 in C.R.O.P. No.275 of 1966, to the effect that after her death the entire property (புலன் பூராவும்) should go only to her grand-daughter (the plaintiff. This statement was given only after the execution of Exhibit B-2 dated 4th April, 1964 by her. If really Krishnammal had intended by Exhibit B-2 to revoke Exhibit B-1 on the basis that the plaintiff had not accepted the settlement and as such it had not come into operation, she would not have given the above statement Exhibit B-6 before the Land Acquisition Officer.

28. As pointed out supra, Krishnammal had reiterated that the settlement Exhibit B-I was executed with the intention of immediately vesting the title on the settlees in almost all her statements given before the Land Acquisition Officer. The plaintiff, in her statement dated 27th August, 1964, before the Land Acquisition Officer, marked as Exhibit A-7 in C.R.O.P. No. 275 of 1966, has accepted the statement of her grand-mother in Exhibit A-6 dated 27th August, 1964 and consented to handover to her grand-mother the compensation amount deposited in Court in respect of the land in S.No.75/1B. In Exhibit B-5 dated 18th June, 1962, another statement given before the Land Acquisition Officer, Krishnammal had stated as follows:

> "எனது பேத்தி தனலக்ஷிமி அம்மாளை வேலூரில் ராமசந்திரனுக்கு திருமணம் செய்துவைத்தேன் தனலக்ஷிமி. ராமசந்திரன் இருவரும் என் பராமரிப்பில்தான் இருக்கிறார்கள். ஏக குடும்பமாகவும் வசித்து வருகிறோம் 1956-ல் நான் எழுதிவைத்த செட்டில்மெண்ட் பத்திரப் படி ஷெடி நிலங்களிலிருந்து கிடைக்கும் மகசூலை நான் என் ஆயுள் காலம்வரை அனுபவித்துக் கொண்டு என் ஆயுள் காலத்திற்கு பிறகு எனது பேரன் நடராஜன், பேத்தி தனலட்சுமியும் அடைய வேண்டியதாகும். நடராஜன் இறந்து விட்டபடியால் எனக்கு பிறகு ஷெடி நிலங்கள் தனலக்ஷ்மிக்கு சேரவேண்டியது. ஆகையால் ஷெடி நிலங்களில் எனக்கும் எனது பேத்தி தனலக்ஷிமிக்கும் தான் உரிமை உண்டு".

In Exhibits B-3 and B.4 marked in C.R.O.P. No.275 of 1966 also, the settlor had reiterated that as per the settlement deed Exhibit B-1, the entire property should go only to the plaintiff. Above all, the original deed of settlement Exhibit B-1 was only in the possession of the plaintiff, the settlee, and it was the plaintif who has produced the same into the Court.

29. All the above stated facts and circumstances would unmistakably reveal that the plaintiff has accepted the gift even during the lifetime of the settlor Krishnammal. Therefore, we find that the transaction under Exhibit B-1 has been completed by the acceptance thereof by the plaintiff, the settlee, and therefore, the said document is quite operative and enforceable and consequently Exhibit B-2 is not a valid document.

30. Though the trial Court has not framed any issue on the above aspect or rendered any finding thereon, there is sufficient evidence recorded in all the proceedings on this aspect for rendering a decision on the question of acceptance of the settlement. As a matter of fact, though the first defendant in O.S. No.192 of 1974 had raised a plea in the written statement that the settlement had not been accepted, the parties seem to have been at issue in the proceedings only on the question whether Exhibit B-1 was a settlement deed or a will, and furthermore if it was a settlement deed, it satisfied all the requirements of law, including the acceptance of it by the donee. However in view of the contentions raised by Mr. Govind Swaminathan, we have ourselves discussed the above question and come to our own conclusion instead of calling for a finding from the Court below after framing the necessary issue as pleaded by the learned counsel for the appellant.

31. In the result, all the appeals fail and would stand dismissed, with costs in A.S. No.404 of 1976 against the first defendant alone. The parties will bear their respective costs in the other two appeals.

S.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and S. Swamikkannu, JJ.*

Hema Ramaswami .. *Appellant**

v.

K. M. Valarance Panjani and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 31, 96—Motor Vehicle — Factual and physical transfer of vehicle—Insurance Policy taken by transferor cannot subsist unless benefits of the policy are transferred to transferee—Change of registry not a condition precedent for transfer of ownership of vehicle.

If there is a transfer of a vehicle, the insurance policy taken by the transferor cannot be taken to subsist unless the benefits of the policy are transferred to the transferee. [*Para.* 11.]

Section 96 of the Motor Vehicles Act, does not warrant the view that a sale or transfer of an insured car by the insured during the currency of the policy does not terminate the policy. [*Para.* 11.]

Section 31 of the Motor Vehicles Act, 1939, could not have the effect of keeping the policy alive *qua* third parties; change of registry under section 31 was not a condition precedent for the transfer of ownership of the vehicle, the said section merely imposed an obligation both on the transferor and the transferee of the vehicle to notify the transfer and the non-compliance thereof would not invalidate the transfer as such which has already taken place. [*Para.* 12.]

Cases referred to:—

Bhoopathy v. *Vijayalakshmi,* (1965) 2 M.L.J. 466: I. L. R. (1966) 2 Mad. 65: 78 L.W. 643: A.I.R. 1966 Mad. 244; *Madras Motor Insurance Company Ltd.* v. *Mohamed Mustafa Badsha,* (1960) 2 M.L.J. 202: 73 L.W. 486: A.I.R. 1961 Mad. 208; *Tattersall* v. *Drysdale,* (1935) All E.R. (Reprint) 112; *Regerson's Case,* (1931) 146 L.T. 26; *Des Raj* v. *Concord of India Insurance Company,* A.I.R. 1951 Punj. 114; *Gyarailal* v. *Sitacharan,* A.I.R. 1963 M.P. 164; *The South India Insurance Company Ltd.* v. *Lakshmi and others,* (1971) A.C.J. 122: (1971) 2 M.L.J. 354: 41 Comp. Cas. 537: 84 L.W. 147: A.I.R. 1971 Mad. 347; *Oriental Fire and General Insurance Company* v. *Vimal Roy,* (1972) A.C.J. 314; *South India Insurance Company Ltd.* v. *Purna Chandra Misra and others,* (1975) A. C. J. 46; *Gulab Bai Damodar Topse* v. *K. Sundar and others,* (1975) A.C.J. 100; *State of Punjab* v. *Brij Mohan Singh,* (1975) A.C.J. 375.

Appeal against the Motor Accidents Claims Tribunal and the decree of the Court of the Subordinate Judge, Cuddalore, dated 15th April, 1977 and passed in Claim Petition No. 83 of 1972.

V. P. Raman, for Appellant.

The Judgment of the Court was delivered by

Ramanujam, J.—This civil miscellaneous appeal is directed against the award of the Motor Accidents Claims Tribunal, Cuddalore, in so far as it is against the appellant, who is the fourth claimant before the Tribunal.

2. On 9th July, 1971 at about 6-15 P.M., near Vellar Bridge, Thozhudur, South Arcot District on the Madras-Trichy Main Road, lorry bearing registration number PYK 1249 driven by one Veerasami collided with an Ambassador Car MSC 7340 driven by one Ramasami, the husband of the appellant. As a result of the said collision, the said Ramasami sustained multiple grievous injuries and he succumbed to those injuries on the way to the hospital. The driver of the car, who was also travelling with the said Ramasami also sustained injuries. On the ground that the said collision was due to rash and negligent driving of the driver of the lorry, the dependants, the mother, wife and two children of the deceased Ramasami filed a claim before the Claims Tribunal claiming a compensation of Rs. 2,00,000. The first claimant was the mother and the claimants 2 and 3 were the children of the deceased by his first wife and the fourth claimant was his second wife.

3. The said claim was resisted by the first respondent, the original owner of the lorry and the third respondent, the Insurance Com-

*A.A.O. No. 526 of 1977.

21st August, 1980.

pany with which the lorry had been insured. The second respondent, who was the transferee of the lorry sometime before the accident however remained *ex parte*. The stand taken by the respondents 1 and 3 in the claim petition before the Tribunal was that they are not liable to meet the claims for compensation, that the lorry had been transferred in favour of the second respondent on 17th April, 1971, and the accident having taken place on 9th July, 1971, neither the first respondent, the original owner of the vehicle nor the third respondent. Insurance Company are liable to meet the claim and that it is only the transferee who has become the owner of the vehicle is liable to meet the claim.

4. In a reply statement, the claimants stated that the vehicle alleged to have been sold by the first respondent to the second respondent was false, that on enquiries it was learnt that the first respondent was the owner of the vehicle at the time of the accident and that the certificate of registration and the public carrier permit stood only in the name of the first respondent at the relevant date. If at all a sale had taken place, it should be only long subsequent to the date of the accident.

5. The Tribunal after analysing the evidence adduced by the parties held that the accident was caused by the rash and negligent driving of the lorry by its driver, who is an employee of the second respondent and that since the ownership of the lorry stood transferred to the second respondent at the time of the accident, he is liable to pay compensation in respect of the accident. The Tribunal also specifically found that the lorry which caused the accident had been transferred in favour of the second respondent by the first respondent on 17th April, 1971; but the registration certificate and the permit relating to the vehicle had not been transferred though the sale had been duly intimated to the Secretary, State Transport Authority, Pondicherry, on 20th April, 1971.

6. On the quantum of compensation, the Tribunal held that the deceased would have earned at least Rs. 1,200 per month and his total earning for the period of 28 years would come to Rs. 4,03,000. But taking into account the benefit of lumpsum payment, it awarded a compensation of Rs. 1,00,000 for all the claimants and the appellant was held to be entitled to Rs. 50,000 out of the said amount of Rs. 1,00,000 which has been awarded as compensation. The fourth claimant has alone appealed and the other claimants have not agitated the matter further.

7. In this appeal filed by the fourth claimant, the findings of the Tribunal exonerating respondents 1 and 3 from liability has been challenged. The compensation awarded by the Tribunal has also been attacked as being too low and inadequate having regard to the status of the deceased and the income he was earning while alive.

8. Thus, the two questions that arise for consideration in this appeal are:

1. Whether the respondents 1 and 3 are rightly exonerated? and

2. Is the compensation of Rs. 1,00,000 awarded by the Tribunal inadequate?

9. In this appeal also, the owner of the lorry, the second respondent remains *ex parte*. But however, the appellant is not satisfied with the award passed against the second respondent alone and seeks an award as against the first and third respondents as well. It is not in dispute that the vicarious liability in respect of the accident has to be determined with reference to the ownership of the vehicle on the date of the accident. In this case, there is no dispute that the lorry PYK 1249 belonged originally to the first respondent. On 8th April, 1971, there had been an agreement between the first respondent and the second respondent to sell the lorry and on 17th April, 1971, the sale transaction had been completed and the vehicle was in fact put in possession of the second respondent by the first respondent. On 20th April, 1971, the first respondent had reported about the sale of the vehicle to the State Transport Authority, Pondicherry. The said report has been marked as Exhibit R-1 in this case. Exhibit R-1 shows that it was received by the Regional Transport Authority on 21st April, 1971. It also shows that the application filed by the parties for transfer of registry of the vehicle in the name of the second respondent was returned by the Regional Transport Office on 12th May, 1971, and no steps were

taken for transferring the registry till 9th July, 1971, the date of the accident. In view of the fact that the transfer had not been ordered by the Regional Transport Authority, the public carrier permit of the lorry stood in the name of the first respondent on the date of the accident and the certificate of registration also stood in the name of the first respondent, the original owner, even after the transfer. The question is whether under those circumstances the transferor and his insurer are liable in respect of the accident which had taken place subsequent to the transfer of the ownership of the vehicle but before the transfer is recognised by the Regional Transport Authority.

10. According to Mr. V. P. Raman, the learned counsel for the appellant, the first and the third respondents would continue to be liable under the policy until the first respondent transferred the vehicle in the name of the second respondent within the meaning of law and as the transfer was admittedly not effected in the records of the Regional Transport Authority on the date of the accident, the Insurance Company would continue to be liable under the policy. In dealing with this question, the Tribunal relying on a decision of a Division Bench of this Court in *Bhoopathy* v. *Vijayalakshmi*[1], held that notwithstanding the fact that the registry and the permit of the vehicle had not been transferred on the date of the accident, the transferor cannot be made liable if the vehicle had in fact been transferred to the transferee and that if the accident had happened after the vehicle had been transferred and when it was in the custody and possession of the transferee, the transferee alone is liable to meet the claim for compensation. The learned counsel for the appellant contends that the said decision relied upon by the Tribunal has no application to the facts of this case especially when it is found in the case before that Court there was in fact a transfer of registry of the vehicle even before the date of the accident. It is true in *Bhoopathy* v. *Vijayalakshmi*[1], it has been found that the transfer of the vehicle was duly recognised by the Regional Transport Authority; but the transferor did not inform the Insurance Company about the transfer and those facts are not *in pari materia* with the facts of the present case. But however, even assuming that the said decision does not apply to the facts of this case where the transfer of the vehicle had not been recognised by the Regional Transport Authority on the date of the accident, the case before us appears to be *a fortiori* case. Herein, there has been a transfer of the vehicle long before the accident and the same has been notified to the concerned Regional Transport Authority. But there is no evidence as to whether the transfer was notified to the Insurance Company either by the transferor or by the transferee. Thus, there has been a factual and physical transfer of the vehicle by the first respondent in favour of the second respondent as early as 17th April, 1971. Though the transfer has been notified to the Transport Authority, the registration of the vehicle had not been changed and the registry continued in the name of the transferor. In the light of these facts, we have to determine the liability of the first respondent, the original owner of the vehicle and the third respondent, the Insurance Company with which the vehicle stood insured.

11. In *Madras Motor Insurance Company Limited* v. *Mohamed Mustafa Badsha*[1]. Ananthanarayanan, J., as he then was, took the view that a policy of insurance did not lapse the moment the insured parted with the ownership of the insured vehicle and that notwithstanding such transfer of ownership, the insurer having regard to the terms of section 96 of the Motor Vehicles Act, could not escape its liability in respect of the third party risks. This view was not accepted by the Division Bench in *Bhoopathy* v. *Vijayalakshmi*[2], referred to above. The Bench disagreed with the view but agreed with the view expressed by Goddard, J., in *Tattersall* v. *Drysdale*[3]. In that case, there was a clause in the policy extending the cover against third

1. (1965) 2 M.L.J. 466: I.L.R. (1966) 2 Mad. 65: 78 L.W. 643: A.I.R. 1966 Mad. 244.

1. (1960) 2 M.L.J. 202: 73 L.W. 486: A.I.R. 1961 Mad. 208.
2. (1965) 2 M.L.J. 466: I.L.R. (1966) 2 Mad. 65: 78 L.W. 643: A.I.R. 1966 Mad. 244.
3. (1935) All E.R. (Reprint) 112.

party risks to the temporary user by the insured of another car, and during the continuance of the policy, the insured sold the car covered by the policy, the subject-matter of the insurance. The accident having occurred while the insured used another car, he made a claim. Rejecting that claim, Goddard, J|K., held the policy insured the plaintiff in respect of the ownership and user of the specified car and when he divested himself of his interest in that car the extension clause ceased to have effect. Goddard, J., has observed:

> "The true view in my judgment is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated as was found in *Rogerson's case*[1], partly on value and partly on horse power. . . . To construe this policy otherwise would be to hold in effect that two distinct insurances were granted one in respect of the scheduled car, and another wholly irrespective of the ownership of any car".

It is seen that the view of Ananthanarayanan, J., in *Madras Motor Insurance Company Limited* v. *Mohamed Mustafa Badsha*[2], did not find favour with the Punjab High Court in *Des Raj* v. *Concord of India Insurance Company*[3] and the Madhya Pradesh High Court in *Gyarailal* v. *Sitacharan*[4]. It is therefore clear that the decision taken by Ananthanarayanan, J., as he then was, in *Madras Motor Insurance Company Limited* v. *Mohamed Mustafa Badsha*[2], cannot be taken to lay down the correct law on the subject. Therefore, if there is a transfer of a vehicle the insurance policy taken by the transferor cannot be taken to subsist unless the benefits of the policy are transferred to the transferee. Section 96 of the Motor Vehicles Act, which is taken to be a basis for the view taken in *Madras Motor Insurance Company Limited* v. *Mohamed Mustafa Badsha*[2], does not in our opinion warrant the view that a sale or transfer of an insured car by the insured during the currency of the policy, does not terminate the policy in view of section 96 of the Motor Vehicles Act.

12. We are not also in a position to agree with the learned counsel for the appellant that unless the sale of the vehicle has been recognised and the transfer of registry is effected by the Transport Authority, there is no completed transfer in law and therefore, the liability of the insured shall be taken to continue until the registry of the vehicle is transferred in the name of the transferee. It has been held by this Court in *The South India Insurance Company Limited* v. *Lakshmi and others*[1], that if there has been a transfer of ownership of vehicle before the date of the accident, the liability for the accident cannot be fastened on the transferor even though the transfer has not been recognised by the Regional Transport Authority and the registration had continued in the name of the transferor. In that case, the vehicle involved in the accident had been transferred by the insured before the accident but the registration still continued to remain in his name. The Insurance Company repudiated liability on the ground that the policy lapsed upon the physical transfer of the vehicle and therefore, they are not liable to any claim for compensation. It was contended on behalf of the claimant that the transfer of the vehicle did not take effect, in so far as the third parties are concerned, until the transfer is duly registered with the registry as envisaged under section 31 of the Motor Vehicles Act, 1939. It was held by one of us that a policy of insurance came to an end when a vehicle was physically transferred by the owner that. Section 31 of the Motor Vehicles Act, 1939, could not have the effect of keeping the policy alive *qua* third parties, that change of registry under section 31 was not a condition precedent for the transfer of ownership of the vehicle, that the said section merely imposed an obligation both on the transferor and the transferee of the vehicle to notify the transfer and that the non-compliance thereof will not invalidate the transfer as such which has already taken place. The same view has been taken by the Delhi High Court in *Oriental Fire and General Insu-*

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1. (1931) 146 L.T. 26.
2. (1960) 2 M.L.J. 202 : 73 L.W. 486 : A.I.R. 1961 Mad. 208.
3. A.I.R. 1951 Punj. 114.
4. A.I.R. 1963 M.P. 164.

1. 1971 A.C.J. 122: (1971) 2 M.L.J. 354 : 84 L. W. 147: 44 Com. Cas. 537: A.I.R. 1971 Mad. 347.

rance Company v. *Vimal Roy*[1], by the Orissa High Court in *South India Insurance Company Limited* v. *Purna Chandra Misra and others*[2], by a Division Bench of the Bombay High Court in *Gulab Bai Damodar Tapse* v. *K. Sunder and others*[3] and by the Punjab and Haryana High Court in *State of Punjab* v. *Brij Mohan Singh and others*[4]. Having regard to the preponderance of judicial opinion, it is not possible to accept the submission of the learned counsel that the transfer of the vehicle will not put an end to the policy, but it is only the transfer of the registry from the name of the transferor to the name of the transferee alone will have the effect of putting an end to the policy, cannot be accepted. We are, therefore of the view that in this case, the vehicle having been transferred long before the accident, the transferor and the Insurance Company with which the vehicle had been insured by the first respondent, cannot be made liable in respect of the accident which admittedly took place long after the transfer while the vehicle was in possession and custody of the second respondent and it is the second respondent's driver who caused the accident by his rashness and negligence in driving the vehicle. We have to therefore, sustain the dismissal of the claim as against the first and the third respondents by the Tribunal.

13. Coming to the question of quantum of compensation, the learned counsel for the appellant contends that the deceased would have earned throughout if he had been alive, a sum of Rs. 4,03,000 but reduced the dependency of the family to Rs. 1,00,000. According to the learned counsel, the deduction for lump sum payment cannot be to the extent of 75% as has been adopted by the Tribunal. The Tribunal has held referring to the Income-tax assessment orders and also the other materials, that the deceased would have earned at least Rs. 12,000 per month if he had been alive for a period of 28 years. The deceased was aged 42 years at the time of his death and the Tribunal assumed his longevity to be 70 years and it has only on that basis chosen to multiply the annual dependency by 28. On the materials on record, we are inclined to agree with the Tribunal that the deceased would have earned at least Rs. 1,200 per month. But out of the sum of Rs. 1,200 he had to attend to his personal needs and also to maintain his mother; the first claimant, claimants 2 and 3 his minor children and his wife, the fourth claimant. Having regard to the number of persons depending on him, we can assume that a sum of Rs. 750 per month out of Rs. 1,200 earned by him, would have gone to the benefit of the claimants who are his dependants. Thus, the annual dependency of the claimants on the deceased will be Rs. 750 per month. Having regard to the age of the deceased at the time of his death, we are inclined to adopt 15 as the multiplier. On this basis, the loss of pecuniary benefit arising out of the death would be Rs. 1,35,000.

14. Apart from this, the claimants are entitled to a compensation under the head "loss of expectation of life". The deceased who was the only earning member and head of the family and on whom the entire family relied for support had died and therefore, the loss is all the more greater. We therefore award a sum of Rs. 15,000 as compensation for loss of expectation of life. Thus, the total compensation comes to Rs. 1,50,000. However, the other claimants not having appealed and the fourth claimant alone having come before us in appeal, we increase the sum of Rs. 50,000 awarded as compensation to the appellant to Rs. 75,000 taking into account the over all increase in the compensation from Rs. 1,00,000 to Rs. 1,50,000. The benefit of the increase in compensation will not be available to the other claimants as they have not filed the appeal. The appellant will therefore be entitled to a sum of Rs. 75,000 as compensation from the second respondent. Thus, the appeal, is partly allowed to the extent indicated above. No costs.

S.J. —— *Appeal partly allowed.*

1. (1972) A.C.J. 314.
2. (1975) A.C.J. 46.
3. (1975) A.C.J. 100.
4. (1975) A.C.J. 375.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ratnam, J.*

J. Sreenivasalu Chettiar .. *Petitioner**

v.

V. Parthasarathi Naidu .. *Respondent.*

Arbitration Act (X of 1940), section 34—Suit for possession—Defendant served with suit summons—Entered appearance through counsel—Vakalat filed by counsel—Suit adjoruned for filing written statement—Petition by defendant to stay all proceedings in the suit—Defendant whether entitled to invoke the provisions of the Act.

Held: An arbitration clause existed in the present case. When a party to an arbitration agreement initiates legal proceedings against the other party to the agreement with respect to the subject-matter thereof, then the other party is entitled to ask for a stay of further proceedings in order to enable the terms of the arbitration agreement to be carried out. Further the mere existence of an arbitration clause does not *ipso facto* operate as a bar to a suit in a Court and there is no obligation cast on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to resort to a suit by an aggrieved person is conferred by section 9 of the Code of Civil Procedure, and curtailment of such a right has to be necessarily established by a party seeking to do so. In the case of an arbitration agreement, the defendant, before he can successfully pray for an order staying the suit, in addition to fulfilling other conditions mentioned in section 34 of the Arbitration Act must make an application before the Court praying for stay before filing the written statement or taking any other step in the suit. The nature of the step which disentitles a defendant from invoking the benefit of section 34 of the Act should be such as to indicate that the party had acquiesced in the method of having the dispute decided by the Court by a participation in and contribution to its further progress or by any act showing acquiescence in the jurisdiction of the Court. In other words, there must be some expression of a desire on the part of the defendant to take a step in the suit indicating that the defendant proposes to go on with the suit and abandon the agreement to refer to arbitration. [*Para.* 3.]

In the present case, the summons as well as a copy of the plaint were served on the petitioner and the petitioner had certainly full knowledge of the claim in the suit. Under Order 9, rule 1 of the Code of Civil Procedure, it is the duty of the defendant to be in attendance at the Court either in person or through advocate on the day fixed in the summons and unless the hearing is adjourned to a future day fixed by the Court, the suit shall be heard. In the present case, time had been granted for filing the written statement. Such grant of time would indicate that it must have been only pursuant to a request made by the learned counsel for the petitioner who had filed the vakalat. Otherwise the Court would have proceeded with the hearing of the suit. It is thus evident that the petitioner being fully aware that having regard to the provision for resolving the disputes by reference to arbitration yet chose to instruct his counsel to appear before the Court and pray for time for filing the written statement which was also granted by the Court. This is a clear manifestation of a desire on the part of the petitioner to take almost the first step in the suit indicating that he intended to go on with the suit and not to resort to the arbitration provision. So when the petitioner entered appearance through his counsel, who, on instructions, sought time for the purpose of filing a written statement when the petitioner fully conscious of his right to invoke the provisions of section 34 of the Arbitration Act which he had asserted earlier even in his reply notice, the petitioner did take a step in aid of the progress of the suit and submit to the jurisdiction of the Court and therefore he is precluded from invoking section 34 of the Arbitration Act. [*Para.* 3.]

Cases referred to:—

The State of Uttar Pradesh v. *M/s. Janki Saran Kailash Chandra*, (1974) 1 S.C.J. 449 : (1973) 2 S.C.C. 96: A.I.R. 1973 S.C. 2071; *M/s. Prem Nath Pran Nath* v. *Amba Parshad*, A.I.R. 1941 Lah. 64; *M.P. Liokiah and others* v *V.M. Jayaram Naidu*, (1971) 2 M.L.J. 155.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayu-

* C.R.P. No. 2847 of 1979.

26th February, 1980.

ram dated 13th September, 1979 and made in C.M.A. No. 2 of 1979 (I.A. No. 840 of 1978 in O.S. No.75 of 1978, District Munsif's Court, Mayuram, dated 13th November, 1978).

S. Sridharan, G. Masilamani, R. Balachander and *G. Narasimhalu*, for Petitioner.

D.C. Krishnamoorthy, for Respondent.

The Court delivered the following

JUDGMENT:—The defendant in O.S. No.75 of 1978, District Munsif's Court, Mayuram, who succeeded in obtaining stay of further proceedings in the suit under section 54 of the Arbitration Act, 1940 (hereinafter referred to as the Act) before the learned District Munsif of Mayuram and lost before the learned Subordinate Judge, Mayuram, is the petitioner in this Civil Revision Petition. Certain facts which would help to appreciate the rival contentions of the parties are not in dispute. It is admitted that the petitioner and the respondent entered into a lease agreement dated 21st December, 1964, under which if the respondent wants the petitioner to vacate the premises, sufficient time had to be given and a provision for the nomination of four arbitrators to decide the market value of the superstructure was also made and the value so fixed should be paid by the respondent to the petitioner. Originally, the respondent instituted O.S.No.397 of 1975 on the file of the District Munsif's Court, Mayuram, for the recovery of possession and that suit was also decreed. However, on appeal, in A.S.No.28 of 1977, Sub-Court, Mayuram, preferred by the petitioner the suit was dismissed. Thereafter, the respondent issued a notice on 25th January, 1978 to the petitioner terminating the tenancy in favour of the petitioner and demanding surrender of possession of the property expressing his willingness to pay the value of the superstructure as well as the compound wall in a sum of Rs. 950. In response to this, the petitioner had on 8th February, 1978, sent a reply setting out the terms of the agreement between the parties dated 21st December, 1964, and in particular inviting the attention of the respondent that resort would be had to the provisions of the Arbitration Act in the event of the respondent filing the suit for the recovery of possession. It was thereafter that the respondent instituted a suit in O.S.No. 75 of 1978 on 15th March, 1978 praying for a decree against the petitioner to surrender possession of the suit property with the superstructure or to surrender possession without the superstructure and for other incidental reliefs. It is not disputed that the petitioner was served with the summons in the suit and the suit was posted for appearance on 16th June, 1978. On that day, the petitioner entered appearance through counsel and a vakalat on his behalf was also filed. It is admitted that the suit was adjourned to 17th July, 1978, for filing of the written statement by the petitioner. However, on 12th July, 1978, the petitioner filed an application under section 34 of the Arbitration Act to stay all further proceedings in the suit till the determination of the rights of the parties in accordance with the provisions of the Act. That application was opposed by the respondent herein on the ground that since the petitioner had entered appearance through his counsel and had requested time for written statement, that would amount to participation of the proceedings and a submission to the jurisdiction of the Court and therefore, section 34 of the Act cannot be invoked by the petitioner.

2. The learned District Munsif, Mayuram, who heard this application on 1st November, 1978, in the course of his order dated 13th November, 1978, was of the view that the Court automatically and in the usual course, adjourned the suit to 17th July, 1978 for filing the written statement, and no oral representation was made by the learned counsel for the petitioner for filing the written statement and therefore, it cannot be said that the petitioner had participated or had taken any steps in the proceedings as contemplated under section 34 of the Act. On this conclusion, the learned District Munsif held that the petition was maintainable and allowed the same. However, on appeal in C.M.A.No. 2 of 1979, Sub-Court, Mayuram, the learned Subordinate Judge held that the circumstance that time had been granted for filing the written statement indicates that it must have been only on the request of the petitioner and that it is not known how the learned District Munsif was able to recollect and remember as to what happened on 16th June, 1978, when the hearing of the application was on 1st November, 1978. Under those circumstances, the learned Subordinate Judge held that time had been granted by the Court for filing the written statement only on the representation of the learned counsel for the petitioner and therefore, the petitioner had

participated in the proceedings and submitted to the jurisdiction of the Court and consequently, the application under section 34 of the Act is not maintainable. In this view, the order passed by the learned District Munsif was set aside and the appeal was allowed.

3. In this civil revision petition, the only question that arises for consideration is whether the petitioner by reason of his participation in the proceedings had forfeited his right to maintain an application under section 34 of the Act. Before proceeding to consider this aspect, it is necessary to advert to section 34 of the Act which runs as under :

> "34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

The language of the section being quite plain, there is little doubt about the legal position in relation to the scope and meaning of section 34 of the Act. The existence of a clause providing for an arbitration in the present case is not in dispute. If that be so, then the position is that when a party to such an arbitration agreement initiates legal proceedings against the other party to the agreement with respect to the subject-matter therein, then the other party is entitled to ask for a stay of such further proceedings in order to enable the terms of the arbitration agreement to be carried out. It must also be noticed that a mere existence of an arbitration clause does not *ipso facto* operate as a bar to a suit in a Court and there is no obligation cast on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to resort to a suit by an aggrieved person is conferred by section 9 of the Code of Civil Procedure and curtailment of such a right has to be necessarily established by a party seeking to do so. In the case of an arbitration agreement, the defendant, before he can successfully pray for an order staying the suit, in addition to fulfilling other conditions mentioned in section 34 of the Act, must make an application before the Court praying for stay before filing the written statement or taking any other step in the suit. The nature of the step which would disentitle a defendant from invoking the benefit of section 34 of the Act should be such as to indicate that the party acquiesced in the method of having the dispute decided by the Court and a participation in and contribution to its further progress or any act showing his acquiescence in the jurisdiction of the Court. In other words, there must be some expression of a desire on the part of the defendant to take a step in the suit indicating that the defendant proposes to go on with the suit and abandons the agreement to refer to arbitration. The question which may now be considered is whether the petitioner has taken any step in the proceeding as contemplated by section 34. Though the learned counsel for the petitioner would submit that the Court *suo motu* granted time for filing the written statement and therefore, the petitioner cannot be disentitled from maintaining the application under section 34 of the Act on the ground that he had taken step in the proceedings, it is not possible to accept the same under the circumstances of the present case. Having taken the stand even in the reply notice dated 8th February, 1978 that he would invoke the provisions of the Arbitration Act in the event of a suit being filed by the respondent herein, it is obvious that the petitioner was fully aware of the existence of the agreement to resolve the dispute by reference to arbitration and that he could invoke section 34 of the Act seeking a stay of the further proceedings in the suit. It is not in dispute that in the present case, the summons as well as a copy of the plaint were served on the petitioner and if so, the petitioner certainly had full knowledge of the claim in the suit. Under Order 9, rule 1 of the Code of Civil Procedure it is the duty of the defendant to be in attendance at the Court either in person or through advocate on the day fixed in the summons and unless the hear-

ing is adjourned to a further day fixed by Court, the suit shall be heard. In the present case, the fact remains that time had been granted for filing of the written statement upto 17th July, 1978. Such grant of time would indicate that it must have been only pursuant to a request made by the learned counsel for the petitioner, who had filed the vakalat on 16th June, 1978. Otherwise, the Court would have proceeded with the hearing of the suit. It is thus evident that the petitioner being fully aware that having regard to the provision for resolving the dispute by reference to arbitration, yet chose to instruct his counsel to appear before the Court and pray for time for filing the written statement which was also granted by the Court. This, in my view, is a clear manifestation of a desire on the part of the petitioner to take almost the first step in the suit indicating that he intended to go on with the suit and not to resort to the arbitration provision. Under these circumstances the lower appellate Court was perfectly justified in holding that the petitioner had participated in the proceedings and had also submitted to the jurisdiction of the Court, which would disentitle him from invoking the procedure under section 34 of the Act.

4. However, the learned counsel for the petitioner relies upon the decision of the Supreme Court in *The State of U.P. and another* v. *M/s. Janki Saran Kailash Chandra and another*[1]. In that case, the respondents had instituted a suit for the recovery of certain amounts by way of damages for breach of contract impleading the appellants (defendants 1 and 2). After service of summons in the suit on 22nd September, 1966, the District Government counsel filed his appearance and also put in an application praying for a month's time for filing the written statement, which was granted. Thereafter, on 1st October, 1966, the District Government Counsel, by means of an application invoked section 34 of the Arbitration Act and prayed that the suit should be stayed. The trial Court held that the dispute was subject to the arbitration clause and since no steps had been taken in the suit and the written statement had also nor been filed, the suit was liable to be stayed. However, on appeal, the High Court held that the action of the District Government counsel in applying for time to file the written statement amounted to taking a step in the proceedings within the meaning of section 34 of the Act and in this view, the defendant was held disentitled to claim that the suit should be stayed. On further appeal to the Supreme Court, it was held that the District Government counsel chose to ask for time to file the written statement and this act was purported to be done on behalf of the State Government which he was fully empowered to do and after having taken the benefit of a successful prayer for an adjournment of the case by one month for the purpose of the filing of the written statement, it is hardly open to the State Government to plead that the District Government counsel was not authorised to seek adjournment on his behalf. In this view, the Supreme Court ultimately upheld the order of the High Court. It must be remembered that in that case also the written statement was indisputably not filed before the application for stay was presented. The question whether any step was taken in the proceedings as contemplated by section 34 was considered and it was held that praying for time for filing the written statement would amount to the taking of a step in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy between the parties to the suit. In my view, this decision, far from assisting the petitioner in any manner, clearly supports the stand taken by the respondent. The learned counsel for the petitioner also relied upon the decision in *M/s. Prem Nath Pran Nath* v. *Amba Parshad*[1]. In that case, a suit was brought against the defendant in the Small Causes Court at Amritsar and no copy of the plaint was attached to the summons. On the date fixed in the summons, the defendant appeared in Court and brought the defect to the notice of the Court and thereupon, he was supplied with the copy of the plaint. Thereafter, the case was adjourned in order to give him sometime to prepare a written statement. On the next adjourned date, the defendant applied for stay of proceedings under section 19 of the Arbitration Act, 1899. The application was rejected by the Small Causes Court on the ground that the grant of the adjournment meant that the

1. (1974) 1 S.C.J. 449: (1973) 2 S.C.C. 96 : A.I.R. 1973 S.C. 2071.

1. A.I.R. 1941 Lah. 64.

defendant had taken a step in the proceedings. The correctness of this order was challenged before the High Court and the High Court held that since the defendant had not been supplied with the copy of the plaint, the proceedings cannot be said to have commenced and if under those circumstances, an application for time for filing the written statement was made, that cannot be regarded as a step taken in the proceedings by the defendant. The facts of that case are totally different from the facts of the present case. In the present case, it is not the stand taken by the petitioner that he was not aware of the claim made in the suit or that a copy of the plaint was not enclosed along with the summons in the suit. It is also further significant to note that the petitioner even in his reply notice made it clear that he was fully conscious of his right to invoke section 34 of the Arbitration Act in the event of a suit being instituted against it; inspite of it, he proceeded to engage a counsel who prayed for time for filing the written statement. These circumstances, in my view, would make the decision relied upon by the learned counsel for the petitioner inapplicable to the present case. On the other hand, the learned counsel for the respondent strongly relies upon the decision in *M.P. Lokiah and others* v. *V.M. Jayaram Naidu*[1]. In that case, the question that arose was whether an application for return of documents would constitute a step in the proceedings as contemplated by section 34 of the Arbitration Act. In discussing the scope as to what would constitute taking a step in the proceedings, this Court observed at page 157 as under :

> "The words 'other steps in the proceedings' would embrace within their amplitude a large variety of acts. An application by a party indicating that he has participated in the proceedings of the case or has contributed to its further progress or any act by a party showing that he has acquiesced in the jurisdiction of the civil Court would constitute a step in the legal proceedings. An application by the defendant for the appointment of a Commissioner or Receiver for taking an inventory or for possession of property would obviously be a step in the proceedings; in such a case, he seeks the assistance of the Court for the avowed purpose of establishing his case and defeating the suit. *An application for time* (Italics mine) or for extension of time to file the written statement or for postponement of the hearing of the suit would also be an obvious step in the proceedings; and the defendant's intention to proceed with the suit rather than his insistence upon the arbitration clause can be readily inferred.......................In all these cases it can be legitimately inferred that he intended to abandon his claim to refer the matter to arbitration and proceed with the trial."

In view of the above principle, the contention of the learned counsel for the petitioner is untenable. It must therefore be held that when the petitioner entered appearance through his counsel, who on instructions sought time for the purpose of filing a written statement, when the petitioner was fully conscious of his right to invoke the provisions of section 34 of the Act which he had asserted earlier even in his reply notice, the petitioner did take a step in aid of the progress of the suit and submit to the jurisdiction of the Court and therefore, he is precluded from invoking section 34 of the Act. Under these circumstances, the order of the lower appellate Court is perfectly correct and does not merit any interference in revision. The Civil Revision Petition fails and is dismissed with costs.

R.S. ——— *Petition dismissed.*

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1. (1971) 2 M.L.J. 155.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and P. Venugopal, JJ.*

K. Vellappa Gounder and Sons, by Partner, K. Vellappa Gounder and others .. *Appellants**

v.

K. S. Thirugnanasambandam Chettiar and others .. *Respondents.*

Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963), sections 3 (1), 8 (1) *and* 13—*Owner of site claiming patta where superstructure belonged to another—Claim whether tenable.*

The provisions of section 3 (*b*) and section 13 of the Tamil Nadu Minor Inams Act (XXX of 1963) are similar to sections 3 (*b*) and 18 (4) and 18 (5) of Madras Act XXVI of 1948. The ratio of the judgments under that Act are clearly applicable for the interpretation of sections 3 (*b*) and 13 of the Minor Inams Act. Therefore unless, a person owns both the building and the site on which the building is situate, it will not vest in him so as to enable him to obtain a ground rent patta under section 13. [*Para.* 6.]

It is clear from the provisions of the Act and decided cases that in order to enable him to obtain a ground rent patta under section 13 he must be the owner of the site and the building and if the owner of the building is anybody other than the landholder the land will be vested in the Government under section 3. Section 3 (*b*) saves only the express provisions of the Act. [*Para.* 7.]

"Land" in section 8 of Act (XXX of 1963) read in conjunction with section 9 will not include the site on which a building is situate. Ryotwari pattas are issued under section 8 or section 9 which would normally mean with respect to cultivable lands in the inam estate and ground rent patta is appropriate only to the case of non-cultivable lands such as house-sites. [*Para.* 9.]

There is no provision similar to section 19-A of Madras Act XXVI of 1948, where admission to non-ryoti land by a landholder could be recognised by Government. But all the same the provisions of the Minor Inams Act, or any other provisions do not prevent the Government from considering the claims of the owners of the building for grant of patta outside the provisions of the Act. Therefore it would be open to the persons who are owning the buildings to apply to the Government in whom the site is vested by virtue of section 3 (*b*) for grant of a ground rent patta outside the provisions of the Act. [*Para.* 9.]

Cases referred to:—

Silambani Sri Chidamabara Vinayagar Swami Devasthanam v. *Duraiswami Nadar,* (1971) 2 M.L.J. 278: 84 L.W. 492: A.I.R. 1971 Mad. 474; *Sri Kumara Kattalai Subramaniyaswamy Devastanam* v. *Sundaram Chettiar,* I. L. R. (1975) Mad. 501; *Somasundaram Pillai* v. *Doraraj,* (1979) 1 M.L.J. 444: 92 L. W. 366; *Natarajan* v. *Rani Kannuthai,* (1973) 2 M.L.J. 338: 86 L.W. 577: AI.R. 1974 Mad. 98.

Appeal against the order of the Special Tribunal for Inam Abolition Acts, Coimbatore at 31st July, 1975 in C.M.A. Nos. 18 etc., of 1975.

M. R. Narayanaswami for *R. Balasubramaniam* and *D. Raju,* for Appellants.

Chandran, for Additional Government Pleader, for Respondent.

V. Natarajan, V. Nicholas, E. Padmanabhan and *G. M. Nathan,* for Respondents.

The Order of the Court was made by

Ramaswami, J.—The land in R.C. No. 209|1 in Tiruppur village, Palladam taluk, Coimbatore District, comprised in T.D. No. 174 was a Devadayam minor inam land and it was granted to one Mayalinga Naicker, for performing 'ugranam service' in the temple of Sri Visweswaraswami and Veeraraghava Perumal at Tiruppur. On a reading of the provisions of the Inam Fair Register Extract relating to this minor Inam, the Settlement Tahsildar came to the conclusion that it is a personal inam burdened with service of the categories specified in section 8 (5) of the Tamil Nadu

* S.T.A. No. 23 to etc. of 1976.
22nd April, 1980.

Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) (hereinafter called the Act). This finding that it is a personal inam burdened with service is not in dispute in this case. The grantee alienated the property by way of permanent lease sometime in 1864. Subsequently, the grantee sold and released the right of reversion thus making the lessee an alienee of the grant itself. Though there was an attempt by the Government to resume the land on the ground of non-performance of service, that ultimately ended in a settlement accepting the alienation as valid. This minor inam was notified under the Act and taken over and the vesting date is 15th February, 1965. It appears that almost the entire area became house-sites and on the date when the minor inam was notified and taken over, there were buildings on the sites. These properties were divided into two schedules in the order of the Settlement Tahsildar. Schedule A related to cases where the buildings and sites were owned by a single individual. Schedule B related to cases where the superstructures were owned by different persons, but the sites were owned by the alienees from the grantees who will hereinafter be referred to as the 'land owners'. The Settlement Tahsildar, following a decision of this Court reported in *Silambani Sri Chidambara Vinayagar Swami Devasthanam* v. *Duraiswami Nadar*[1], held that the persons who owned the buildings and the sites would be entitled for a patta under section 13 of the Act. In respect of these cases where the superstructures are owned by different persons and not by the owners of the sites a joint patta was directed to be issued in favour of the persons owning the superstructure and the landowner. Both the landowners and the owners of the buildings preferred appeals in respect of cases where there were directions for issue of joint pattas and claimed that each was entitled to separate patta under section 13. The Tribunal held that unless a person owns both the building and the site, patta cannot be granted to the owner of the building alone and rejected the claim by the owner of superstructures. But the Tribunal directed the issue of patta to the landowners on the ground that they are the owners of the sites and that therefore, they must be deemed to be the owner of the buildings and accordingly patta has to be issued to them under section 13. It is as against this judgment, these batches of cases are filed.

2. The finding that the appellants in all these cases are the owners of the superstructures concerned in these cases is a concurrent finding and there are no grounds also to interfere with the same. The finding of the Tribunal that the landowner owned the site is a legal inference made by the Tribunal and that is disputed in these cases. According to the learned counsel for the appellants, in view of the decision of this Court, the landowner cannot claim a ryotwari patta under section 8 (1) in respect of the site alone nor can he claim a patta under section 13 in respect of the building and the site as he did not own the superstructure on the site. On the other hand relying on the decision in *Sri Kumara Kattalai Subramaniyaswamy Devastanam at Mayuram rep. by its hereditary trustee* v. *Sundaram Chettiar*[1] and an unreported judgment in *Ramachandra Pillai* v. *Shanmugam Pillai*[2], the learned counsel for the respondents (landowner) contended that in spite of the provisions in section 3 (*b*) if the Act the landowner continued to be in constructive possession of the site even after the notified date and that, therefore, both the legal title and possession are with the landholders and as such he will either be entitled to a ryotwari patta under section 8 (1) or for a patta under section 13 itself as a person owning the site.

3. Before dealing with these rival contentions, I may refer to the relevant provision under section 13, which reads as follows:

> "13 (1). Every building situated within the limits of an inam land shall, with effect on and from the appointed day, vest in the person who owned it immediately before that day but the Government shall be entitled for each fasli year commencing with the fasli year in which the appointed day falls to levy the appropriate assessment thereon.

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1. (1971) 2 M.L.J. 278 : A.I.R. 1971 Mad. 474.

1. I.L.R. (1975) 1 Mad. 501.
2. S.A. No. 1139 of 1969 by Ramanujam, J.

(2) In this section 'building' includes the site on which it stands and any adjacent premises occupied by an appurtenance thereto".

4. There was a similar provision in Madras Act XXVI of 1948 in sections 18 (4) and 18 (5). On a construction of these provisions a Division Bench of this Court in *Silambani Sri Chidamabara Vinayagar Swami Devasthanam* v. *Duraiswami Nadar*[1], held that the provisions will be attracted only to cases where the building as well as the site on which it stands belong to the same person on the date of notification and it will not apply to a case where the building and the site are owned by different persons.

5. A similar provision in Act XXVI of 1963 was considered by another Division Bench in *Somasundaram Pillai* v. *Durairaj*[2]. It was held in that case that in a case where the superstructure is owned by a person other than the landholder the site over which the building stands will not vest in the landholder and that section 3 (*b*) will vest the site also in the Government. To hold that the landholders continue to own the site over which the buildings have been built by the tenants notwithstanding the notification, wil be against the teeth of the general vesting contemplated in section 3 (*b*). He can avoid that vesting of the site only if he had put up the building himself and not when someone else had put up a building thereon. The landholder cannot take advantage of the existence of the buildings put up by somebody else to claim that the site continues to vest in him. The Bench also held section 3 (*b*) contemplates the vesting of all lands including gramanatham. But, an exception has been made in section 18 in respect of poromboke lands on which buildings had been erected, by treating such lands as part of the buildings and vesting them in the person owning the buildings.

6. In another Bench decision reported in *Natarajan* v. *Rani Kannuthai* alias *Muthathal Nachiar*[3], considering the scope of vesting under section 3 (*b*), and the provisions of section 18 of Madras Act XXVI of 1948, this Court held that the effect of section 18 (4) is to recognise the pre-existing owner of the building in the persons concerned and if the land and the building are not owned by the same individual, vesting under section 3 (*b*) will not be affected. The provisions of section 3 (*b*) and section 13 of the Minor Inams Act (*sic*) are similar to sections 3 (b) and 18 (4) and 18 (5) of Madras Act XXVI of 1948. The ratio of the judgments is clearly applicable for the interpretation of sections 3 (*b*) and 13 of the Minor Inams Act. Therefore, unless a person owns both the building and the site on which the building is situate, it will not vest in him so as to enable him to obtain a ground rent patta under section 13. The decision in *Ramachandra Pillai* v. *Shanmugha Pillai*[1] and *Srikumara Kattalai Subramaniaswami Devastanam, Mayuram rep. by its herenitary Trustees* v. *Sundaram Chettiar*[2], were rendered by Mr. Justice Ramanujam. Though there were certain stray observations which may lead to an argument that in the case of sites in which there are buildings, section 3 (*b*) would not be operative those decisions cannot be taken as authorities for that position in view of the Division Bench judgment in *Somasundaram Pillai* v. *Durairaj*[3], to which the learned Judge was a party and in fact, the judgment was written by the same learned Judge. As already noted, in *Somasundaram Pillai* v. *Durairaj*[3], the Bench held that in cases where the buildings have been built by parties other than the landholder, the vesting contemplated under section 3 (*b*) cannot be affected and the site is vested in the Government and not in the landholder.

7. It is, therefore, clear from the provisions of the Act and decided cases that in order to enable a person to get a ground rent patta under section 13, he must be the owner of the site and the building, and if the owner of the building is anybody other than the landholder, the land will be vested in the Government under section 3 (*b*). Section 3 specifically saves only the express provisions in the Act.

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1. (1971) 2 M.L.J. 278.
2. (1979) 1 M.L.J. 444 : 92 L.W. 366.
3. 86 L.W. 577 : (1973) 2 M.L.J. 338.

1. S.A. No. 1139 of 1969.
2. I.L.R. (1975) 1 Mad. 501.
3. (1979) 1 M.L.J. 444.

8. It is now necessary to consider the other claim of the respondent-landholder under section 8 (1) of the Act. Under this provision, every person who is lawfully entitled to the kudiwaram in an 'inam land' immediately before the appointed day whether such person is an inamdar or not shall, with effect on and from the appointed day, be entitled to ryotwari patta in respect of 'that land'. 'Inam land' is defined in section 2 (7) as meaning any land comprised in a minor inam. The question for consideration is whether the word 'land' in these provisions will include the site on which a building is constructed. Under section 8 (1) and 8 (2), ryotwari pattas are to be granted to the person who is entitled to the kudiwaram in the land or in the case of institutions owning both warams to the persons referred to in sub-clause (2) of section 9 provides that where no person is entitled to ryotwari patta under section 8 and the land is vested in the Government, the persons specified therein shall be entitled to ryotwari patta. The condition referred to therein refers to personsal cultivation of such land.

9. Section 10 refers to lands in respect of which no ryotwari patta could be granted. They are forests, beds and bunds of tanks and of supply, drainage, surplus or irrigation channels, threshing floor, cattle-stands, village sites, cart tracks, roads, temple sites and such other lands situated in any minor inam as are set apart for the common use of the villagers, rivers, streams and other porombokes and also private tanks and ooranies. It may be possible to construe, as contended by the learned counsel for the respondent that except in respect of lands mentioned in sections 10 and 10-A, in respect of all other lands, section 8 would apply. But even so, we are not convinced that the land in section 8 would include the site on which a building is constructed. Though normally the 'land' in section 8 construed in conjunction with section 9 would bring within it only cultivable land, it is not necessary for the purpose of this case to give a final decision on that question except to state that it will not include the site on which a building is situate. With reference to section 13, the notification in G.O. No. 401, Revenue, dated 15th February, 1965, designating the authorities and officers by whom the power shall be exercised under that provision, states that the power to decide the claim of any person for ground rent patta, is vested in Assistant Settlement Officer whereas with reference to the provisions in section 8 or section 9 it is stated that the power is 'to decide the claim of any person for ryotwari patta'. Thus, ryotwari pattas are issued under section 8 or 9 which would normally mean, with respect to cultivable lands in the inam estate, and ground rent patta is appropriate only to a case of non-cultivable lands such as house sites. The respondent-landholder would not, therefore, be entitled for any patta under section 8 (1) in respect of the site in which the building stands. The net result of the above discussion is, neither the landholder will be entitled for a patta either under section 8 (1) or section 13, nor the appellants who are the owners of the superstructures alone would be entitled to a patta under section 13. There is no provision similar to section 19-A of Madras Act XXVI of 1948, where admission to non-ryotwari land by a landholder could be recognised by Government. But, all the same, the provisions of the Minor Inams Act or any other provisions do not prevent the Government considering the claims of the owners of the building for grant of patta outside the provisions of the Act. Therefore, it would be open to the persons who are owning the buildings to apply to the Government in whom the site is vested by virtue of section 3 (*b*), for grant of a ground rent patta outside the provisions of the Act. The orders of the Settlement Tahsildar and the Inam Tribunal in so far as the lands which are the subject-matters of these appeals are concerned, are therefore, set aside and the owners of the buildings are directed to approach the Government if they so choose. There will be no order as to costs.

R.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, CJ.*

Munuswami .. *Petitioner**

v.

Mallika .. *Respondent.*

Presidency Small Cause Courts Act (XV of 1882), section 47—Applicability.

On an eviction order passed against him, in a suit under section 41 of the Presidency Small Cause Courts Act, the petitioner filed a comprehensive suit in the City Civil Court for a declaration of his rights and for an interim order of injunction. While these were pending the petitioner applied to the Small Causes Court for stay of all further proceedings in execution of the order of eviction. The petition was dismissed on the ground that the remedy of the petitioner was to apply for necessary orders in the injunction application in the comprehensive suit filed by him in the City Civil Court. On revision against the order,

Held: Section 47 of the Presidency Small Cause Courts Act contemplates the occupant filing an application for staying the proceedings initiated under section 41 of the Act undertaking to file a separate and comprehensive suit and it has no application to a case where such a suit has already been filed and the occupant has the opportunity of obtaining interim orders pending that suit. In this case, a suit had already been filed and the application for interim injunction also was pending. Section 47 of the Act is intended to cover the interregnum between the proceedings under section 41 of the Act and the institution of a comprehensive regular suit, so that, during that interrgnum, an occupant may not be subjected to undue hardship by getting an opportunity to have the proceedings under section 41 stayed on his undertaking to institute a suit. Section 47 has no application to a case where a suit has already been instituted and the plaintiff therein has every opportunity of obtaining necessary interim orders in that suit. Hence the Civil Revision Petition is dismissed. [*Para.* 2.]

Cases referred to:—

A. S. Krishna Aiyar v. *N. Subramania Aiyar,* (1923) 44 M.L.J. 386: 17 L. W. 179: A.I.R. 1923 Mad. 323; *Sree Sidhi Budhi Vinayakar Shree Sundareswarar Devasthanam* v. *S. V. Marimuthu,* (1963) 76 L.W. 381: I.L.R. (1963) Mad. 1054: A.I.R. 1963 Mad. 369.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of Small Causes (Registrar) Madras dated 4th August, 1980 passed in M.P. No. 218 of 1980 in E.A. No. 1613 of 1980 in E.P. No. 1335 of 1979 in E.S. No. 209 of 1973.

P. S. Chinnappa, for Petitioner.

The Court made the following

ORDER.—This is a petition to revise the order of the Registrar of the Court of Small Gauses, Madras dated 4th August, 1980, dismissing M.P. No. 218 of 1980 filed by the Petitioner herein. The petitioner was directed to be evicted in a suit filed under section 41 of the Presidency Small Cause Courts Act, 1882. Subsequently, the petitioner filed a comprehensive suit, namely O.S. No. 11069 of 1978 on the file of the City Civil Court, Madras for declaration of his right and also filed I.A. No. 1207 of 1980 for an interim order of injunction and the said suit and the application are said to be pending. It is at that stage the petitioner filed the present peti-

* C.R.P. No. 2440 of 1980.

12th Septemper, 1980.

tion, namely M.P. No. 218 of 1980 before the Court of Small Causes, Madras for stay of all further proceedings by way of executing the order of eviction passed in the ejectment suit. The Registrar, Court of Small Causes dismissed the said petition holding that having filed a comprehensive suit, the remedy of the petitioner would be to apply for necessary orders in the injunction application in the comprehensive suit filed by him in the City Civil Court, Madras and that the proceedings in execution of the order passed in the ejectment suit could not be indefinitely stayed. It is that order that is sought to be revised in the present civil revision petition.

2. The learned counsel for the petitioner strenuously relied on section 47 of the Presidency Small Cause Courts Act, 1882 and also the decisions of this Court in *A. S. Krishna Aiyar* v. *N. Subramania Aiyar*[1] and *Sree Sidhi Budhi Vinayakar Shree Sundareswarar Devasthanam* v. *S. V. Marimuthu*[2], to the effect that section 47 is mandatory and the Small Cause Court is bound to stay the proceedings. I am unable to accept this argument because section 47 has no application to the facts of the present case. Section 47 of the Presidency Small Cause Courts Act, contemplates the occupant filling an application for staying the proceedings initiated under section 41 of the Act undertaking to file a separate and comprehensive suit and it has no application to a case where such a suit has already been filed and the occupant has the opportunity of obtaining interim orders pending that suit. As I pointed out already, in this case, a suit has already been filed and the application for interim injunction also is pending. Section 47 of the Act is intended to cover the interregnum between the proceedings under section 41 of the Act and the institution of a comprehensive regular suit, so that, during the interregnum, an occupant may not be subjected to undue hardship by getting an opportunity to have the proceedings under section 41 stayed on his undertaking to institute a suit. Section 47 has no application to a case where a suit has already been instituted and the plaintiff therein has every opportunity of obtaining necessary interim orders in that suit. Hence the civil revision petition is dismissed.

R.S. ——— *Revision petition dismissed.*

1. (1923) 44 M.L.J. 386: 17 L.W. 179 · A.I.R. 1923 Mad. 323.
2. (1963) 76 L.W. 381: I.L.R. (1963) Mad. 1054: A.I.R. 1963 Mad. 369.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

The Municipal Council, represented by its Special Officer, Tiruvarur .. *Appellant**

v.

Taj Prakasha Thaikal Estate, represented by Advocate-Commissioner, Thiagarajan and others .. *Respondents.*

Tamil Nadu District Municipalities Act (V of 1920), section 82—Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 4—Revision of taxes by municipality—Section 4 of Act XVIII of 1960, not complied with—Assessments held illegal.

The Municipal Council, Tiruvarur revised and enhanced the taxes payable for all the properties situate within the Municipal area in the year 1970. The provisions of section 82 of Act V of 1920 were complied with for the purpose of the revision, but the provisions of section 4 of the Tamil Nadu Act XVIII of

* S.A. Nos. 1433 to 1436 of 1977.

7th October, 1980.

1960 were not complied with. The plaintiffs filed suits challenging the tax-revisions on the ground that section 4 of Act XVIII of 1960 were not complied with. The plaintiffs succeeded in the lower Courts.

On second appeal by the Municipal Council to the High Court,

Held: The assessment of valuation for the purpose of municipal tax must be made in accordance with and in the light of the provisions of the Rent Act which would be in force during the period of assessment. In the instant cases, the Municipality had not complied with the provisions of section 4 of the Tamil Nadu Buildings (Lease and Rent Control) Act. Hence, the assessments were illegal. [*Para*. 3.]

Cases referred to:—

Guntur Municipal Council v. *Guntur Town Rate Payers' Associations*, (1971) 2 An.W.R. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.R. 423: A. I. R. 1971 S. C. 353; *Corporation of Calcutta* v. *Sri Padma Debi and Company*, (1962) 3 S.C.R. 49: A.I.R. 1962 S.C. 151; *Abdul Hasan* v. *Thiruvarur Municipality*, (1978) 1 M.L.J. 121: 91 L.W. 61.

Appeals against the decree of the Sub-Court, Nagapattinam in A.S. No. 180 etc., of 1976, respectively preferred against O.S. No. 226 of 1973 respectively, District Munsif Court, Tiruvarur.

M. Shakir Ali and *K. Devarajan*, for Appellants.

K. Raman and *R. Sitaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—These four appeals have been preferred by the Municipal Council, Tiruvarur, represented by its Special Officer, against the judgments and decrees of the learned Subordinate Judge, Nagapattinam, who dismissed A.S. Nos. 120, 121, 122 and 123 of 1975 as well as the cross-objections preferred against the judgments and decrees of the District Munsif, Tiruvarur, in O.S. Nos. 226, 255, 451 and 513 of 1973 on his file. The suits were instituted by different plaintiffs for a declaration that the general revision and the subsequent increase in tax on the plaintiffs' buildings is illegal and *ultra vires* and for a permanent injunction restraining the defendant-Municipality from realising any amount as per the demand notices and assessments. The taxes payable by the respective plaintiffs for the properties situate within the Municipal limits of Tiruvarur were revised and enhanced in the general revision of taxes payable for all the properties situate within the Municipal area after an enquiry in the year 1970. The provisions of section 82 of the Tamil Nadu District Municipalities Act (V of 1920) were complied with for the purpose of the revision, but the provisions of section 4 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) were not complied with. Therefore, the suits were filed contending that the provisions of section 4 of Act XVIII of 1960, have to be complied with and as this has not been done, the defendant-Municipality is not entitled to revise and enhance the taxes payable by the respective plaintiffs in respect of their respective properties.

2. As the plaintiffs have succeeded in both the Courts below, these appeals have been admitted on the following substantial question of law, *viz*:—

> "Whether the rent fixed under the Tamil Nadu Buildings (Lease and Rent Control) Act is to be the basis for fixation of rental value under section 82 (2) of the District Municipalities Act, or whether such rental value has to be fixed independently?"

The question of law, for the consideration of which these appeals have been admitted, is

covered by the decision in *Guntur Municipal Council* v. *Guntur Town Rate Payers' Associations*[1], where the Supreme Court, after considering the provisions of section 82 (2) of the Madras District Municipalities Act, in relation to the provisions of the Rent Control Acts, has held that—

> "The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The Municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair rent or the standard rent which would be payable for a particular premises under the Rent Act in force during the year of assessment. In *The Corporation of Calcutta* v. *Sri Padma Debi and Company*[2], it was held that on a fair reading of the express provisions of section 127 (*a*) of Calcutta Municipal Act, 1923, the annual rent could not be fixed higher than the standard rent under the Rent Control Act. There the Rent Control Act of 1950 came into force before the assessment was finally determined and it was observed that the Corporation had no power to fix the annual valuation of the premises higher than the standard rent under that Act".

It was contended by the counsel for the appellant in that case that 'so long as the fair rent of a building or premises is not fixed the assessment of valuation by a Municipality need not be limited or governed by the measure provided by the provisions of the Act for determination of fair rent'.

Repelling the contention, the Supreme Court held that—

> "Logically such buildings or premises as are not let out to a tenant and are in the self-occupation of the landlords would also fall within the same principle if no fair rent has even been fixed in respect of them.
>
> We are unable to agree that on the language of section 82 (2) of the Municipalities Act, any distinction can be made between buildings the fair rent of which has been mainly actually fixed by the Controller and those in respect of which no such rent has been fixed. It is perfectly clear that the landlord cannot lawfully expect to get more rent than the fair rent which is payable in accordance with the principles laid down in the Act. The assessment of valuation must take into account the measure of fair rent as determinable under the Act. It may be that where the Controller has not fixed the fair rent the Municipal authorities will have to arrive at their own figure of fair rent but that can be done without any difficulty by keeping in view the principles laid down in section 4 of the Act for determination of fair rent".

3. Finally, in declaring what the law is, the Supreme Court has laid down that it appears to be well-settled that "assessment of valuation for the purpose of tax must be made in accordance with and in the light of the provisions of the Rent Act which would be in force during the period of assessment". This decision of the Supreme Court has been followed by Paul, J., in *Abdul Hasan* v. *Thiruvarur Municipality*[1]. In the instant cases, the Municipality has not complied with the provisions of section 4 of the Tamil Nadu Buildings (Lease and Rent Control) Act. Hence, the assessments are illegal.

4. In the result, the judgment and decrees of the Courts below are confirmed, and these appeals are dismissed. There will be no order as to costs.

S.J. —— *Appeals dismissed.*

1. (1971) 2 S.C.R. 423: (1971) 2 An.W.R. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 M.L.J. (S.C.) 7: A.I.R. 1971 S.C. 353.
2. (1969) 3 S.C.R. 49: A.I.R. 1962 S.C. 151.

1. (1978) 1 M.L.J. 121: 91 L.W. 61.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: - *P. Venugopal, J.*

S. M. O. Uthaman Chettiar ... *Appellant**

v.

R. M. Nachappa Chettiar and others ... *Respondents.*

Tamil Nadu Agriculturists Relief (Amendment) Madras Act (VIII of 1973), section 8 (4) — Sums collected from debtor—Amount found to be excessive—Excess amount not be retained.

Section 8 (4) of Madras Act VIII of 1973 providing for refund of excess amount governs payments made both before and after the coming into force of the Act. [*Para.* 2.]

Excess payments voluntarily made to the creditor or decree-holder is saved from the operation of section 8 (4) if they have been made willingly and voluntarily towards part or full satisfaction of the decree and they have been appropriated by the decree-holder for part or full satisfaction of the claim. The payment in the instant case was as a condition precedent to obtaining stay from the High Court and was neither voluntary nor towards the decree. [*Para.* 2.]

Section 8 (4) must be taken to refer to sums which were duly collected from the debtor and which turned out to be excessive as a result of applying the provisions of the Act and it cannot be understood as justifying the retention of sums recovered by the decree-holder in excess of what was legally due at the time of the recovery. Section 8 (4) does not, therefore, affect the right to restitution in respect of collections wrongfully made, [*Para.* 2.]

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*A. A. O. No. 635 of 1977. *5th September*, 1979.

Case referred to:

Ganapathi Subramania Iyer v. *Gopalasami Naidu*, (1949) 2 M. L. J. 394 : A. I. R. 1950 Mad. 98.

Appeal against the Order of the Sub-Court of Devakottai in E. A. No. 96 of 1974 in O. S. No. 50 of 1965.

V. Kannan for *S. Somasundaram*, for Appellant.

B. Rajagopalan, for Respondents.

The Court made the following

ORDER.—Plaintiff is the appellant. Defendants 2 to 4, the legal representatives of the deceased first defendant are the respondents before this Court. The plaintiff filed a suit, O. S. No. 50 of 1965 on the file of the Court of the Subordinate Judge, Devakottai, against the first defendant and obtained a money decree for a sum of Rs. 13,967-16 together with subsequent interest on Rs. 12,000 at 6 per cent per annum from the date of plaint till the date of realisation and proportionate costs. The first defendant admitted his liability to the extent of Rs. 8,486-49 and preferred an appeal before the High Court in respect of the rest of the decree amount. While the appeal was pending before this Court, the first defendant filed C. M. P. No. 6617 of 1967 and obtained interim stay of execution of the decree. The plaintiff filed an application in C. M. P. No 8513 of 1967 to vacate the stay granted in favour of the defendant, On 19th July, 1967, this Court took up both the petitions and passed a conditional order directing that the first defendant should deposit Rs. 8,486-49 within one month and a further sum of Rs. 2,000 within four months and for the balance the first defendant should furnish security to the satisfaction of the Court of the Subordinate Judge, Devakottai, within four months from the

date of order. The first defendant deposited the amounts as directed by this Court and these amounts were also drawn from Court by the plaintiff decree-holder. This Court disposed of the appeal and granted a decree only for a sum of Rs. 8,486-49. The first defendant died and his legal representatives filed an application under section 144, Civil Procedure Code, to pass a decree for restitution in their favour for a sum of Rs. 2,000 received in excess by the plaintiff. The plaintiff contended that the sum of Rs. 2,000 had gone in satisfaction of the decree amount as originally passed by the trial Court and has been appropriated as such, and under section 8 (4) of Madras Act IV of 1938, as amended by Act VIII of 1973, there is no obligation on the part of the plaintiff to refund the excess amount. The trial Court held that the sum of Rs. 2,000 can never be construed as one paid towards the decree and the deposit was made only to purchase peace by way of staying the execution of the decree and the provisions of section 8 (4) of Act VIII of 1973, cannot be made applicable to this payment Aggrieved against the order of the trial Judge, the plaintiff has filed this appeal before this Court.

2. Learned counsel for the appellant-plaintiff contended that section 8 (4) of Act VIII of 1973, applies only to payments made subsequent to Act VIII of 1973, coming into force and not to payments made prior to the Act coming into force. A similar contention was put forward with reference to section 8 (4) of Act IV of 1938, which is *in pari materia* with section 8 (4) of Act VIII of 1973, and the contention was repelled by this Court in *Ganapathi Subramania Iyer* v. *Gopalasami Naidu*[1], holding that refund of excess amount provided under section 8 (4) of Act IV of 1938, governs the payments made prior and subsequent to 1st October, 1938 The contention of the learned counsel for the appellant that payments made prior to Act VIII of 1973, coming into force will not be governed by section 8 (4) of the Act, has to be repelled. Learned counsel for the appellant next contended that these excess amounts were made voluntarily and willingly and with the full knowledge of the provisions of the Act and such excess amounts can be retained by the appellant-creditor in view of section 8 (4). Excess payments voluntarily made to the creditor or the decree-holder is saved from the opera ion of section 8 (4) if they have been made willingly and voluntarily towards part or full satisfaction of the decree and they have been appropriated by the decree-holder for part or full satisfaction of the claim. The circumstances under which the sum of Rs. 2,000 came to be deposited by the defendants-respondents clearly indicate that it was paid as a condition precedent for the grant of stay by the High Court. As the first defendant admitted the liability under the decree only to the extent of Rs. 8,486-49 and was contesting the rest of his liability under the decree, the sum of Rs. 2,000 paid in pursuance of the order of this Court passed in C. M. P. No. 8513 of 1967 can by no stretch of imagination be construed as payment towards the decree, much less a voluntary and willing payment towards the decretal liability entitling the plaintiff-appellant to appropriate the same towards the decree amount. The payment of Rs. 2,000 by the first defendant was made while he was contesting the liability under the decree and it was made in pursuance of the orders passed by this Court when the defendant filed a petition before this Court for stay of execution of the decree. Section 8 (4) of Act VIII of 1973 must be taken to refer to sums which were duly collected from the debtor and which turned out to be excessive as a result of applying the provisions of the Act and it cannot be understood as justifying the retention of sums recovered by the decree-holder in excess of what was legally due at the time of the recovery. Section 8 (4) does not, therefore, affect the right to restitution in respect of collections wrongfully made. Inasmuch as this Court has modified the decree of the trial Court and the decree ultimately confirmed by this Court was only to the extent of Rs. 8.486-49, the sum of Rs. 2,000 realised by the plaintiff-appellant during the pendency of the appeal cannot be appropriated by the decree-holder and as it represents an amount in excess of what is legally due to the plaintiff-appellant, the defendants-respondents are entitled to restitution of the sum of Rs. 2,000 as prayed. The order of the lower Court is accordingly confirmed. In the result the appeal fails and it is dismissed. No costs.

S. J. —— *Appeal dismissed.*

1. (1949) 2 M. L. J. 394 : A. I. R. 1950 Mad. 98.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

S. Sajjar Rao, S. M. Ramakrishna Rao and Company .... *Appellants**

v.

The Kothari Textiles, represented by it Presidents .... *Respondents.*

(A) *Negotiable Instruments Act (XXVI of 1881), sections 7 91, 115, 116 and 37—Bill of Exchange—Drawee in case of need mentioned in the Bill—Bill dishonoured by drawee—Amount adjusted by drawee, in his books in the folio for the 'drawee in case of need'—Drawee in case of need filing suit against the drawee—Drawee pleading absence of privity of contract—Drawee, held liable to pay.*

(B) *Indian Contract Act (IX of 1872), section 69.*

S & Co., were the selling agents for L. V. Mills for Madras City and other areas. L V Mills supplied goods to the defendants and drew a bill of exchange for Rs. 1,593.67 on the defendants and S. & Co. were mentioned as the drawee in case of need. The Bill was dishonoured by the defendants when presented by the bank and the amount was alleged to have been adjusted in the accounts of the Mills in the folio for S. & Co. Thereafter S & Co. filed a suit against the defendants The defendants contended that there was no privity of contract between the parties in the suit. The trial Court held that there was privity of contract between the plaintiffs and defendants and decreed the suit for Rs. 1,225.41 P. The defendants filed an appeal and the lower Appellate Court allowed the appeal. On Second Appeal to the High Court lay the plaintiff,

Held: The plaintiff was the acceptor of the bill of exchange. The fact that he did not pay the amount due to the bank was not material. The payment was made to the mill only on account of the bill and the payment was made only in his capacity as an acceptor in case of need. There was a statutory recognition, in the provisions of the plaintiff as a surety with respect to the amount which was paid towards the amount due under the bill of exchange. The knowledge of the defendant about the plaintiff being an acceptor could not be disclaimed as the bill carried on its face the name of the plaintiff as an acceptor in case of need. The plaintiff was not in the position of a volunteer. The plaintiff was also interested in the payment as he was liable to pay the amount to the mills Section 69 of the Contract Act would also be applicable. Looked at from any angle, the plaintiff could thus claim the amount from the defendant. There was no equity in the defence. [*Para.* 15.]

Case referred to:—

Perianna Marakayar and Sons v. *Banians and Company*, (1926) I.L.R. 49 Mad. 156 : 23 L. W. 432 : A. I. R. 1926 Mad. 544.

Appeal against the decree of the City Civil Court, Madras in A. S. No. 208 of 1975 preferred against O. S. No. 8837 of 1972 (VIII Asst.), City Civil Court of Madras.

K. N. Balasubramanian and *N. Jothi*, for Appellants.

Trilokchand Chopra and *Madanchand*, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal has been filed by the plaintiff in O. S. No. 8837 of 1972. The suit came to be filed in the following circumstance. The plaintiffs by name Messrs. S. Sajjan Rao, S. M. Ramakrishna Rao and Co., were the selling agents for Lakshmi Vishnu Cotton Mills Limited, Sholapur for the Madras City and other areas. It was stated that on account of the goods sold to the defendants, a sum of Rs. 1,593.67. was due and owed by the defendants to the Mills and that on 27th July, 1969, the Mill drew a bill of exchange on the defendants

*S. A. No. 1938 of 1976.

11th February, 1980.

in the Sight Draft No. 2524 for Rs. 1,593-67. The "drawee in case of need" in that bill was said to be the plaintiffs. The goods were despatched by Lakshmi Vishnu Cotton Mills from Sholapur to the defendants and the relevant documents were sent through a bank. The defendants dishonoured the bill and the amount was alleged to have been adjusted in the accounts of the mills in the folio for the plaintiffs in December, 1970. The plaintiffs, therefore, filed a suit for recovery of Rs. 2,537.67 with further interest on the sum of Rs. 1,593,67 from the date of the plaint to the date of payments. The defendants contended that there was no privity of contract between the parties to the suit and therefore the suit was liable to be dismissed *in limine*. It was also stated that payments had been made to the mills and that the mills never demanded any amount from the defendants.

2. The learned trial Judge went into the question whether there was privity of contract between the plaintiffs and the defendants. It was held that there was privity. However, the decree was passed only with reference to the sum of Rs. 778.47 with interest at 12 per cent. per annum from 27th July, 1969. The suit was thus decreed for Rs. 1,225.41 with proportionate costs.

3. There was an appeal by the defendants against this judgment which came before the III Additional Judge, City Civil Court, Madras. He went into the question whether the plaintiffs were entitled to the entire suit claim or only to the amount as decreed by the trial Court. He held that there was no evidence to suggest that the plaintiffs were in the position of surety, that they undertook the obligation to pay the amount due from the defendants to the mills and that they had become subrogated to the rights of the mills. In this view, the appeal was allowed and the judgment and decree of the trial Court were set aside. There was also cross-objection by the plaintiffs with reference to the balance that was not decreed and the cross objection was dismissed. The plaintiffs have come forward with the present appeal.

4. The learned counsel for the appellant contended that the bill of exchange bearing No. 135 mentioned the appellant as a 'drawee in case of need' and, that as a person who had paid the bills he was entitled statutorily to be treated as a surety and that therefore the plaintiff could recover the full amount. The learned counsel for the respondents submitted that this is not a case in which the plaintiff came forward with any suit on a bill of exchange in which he was a drawee in case of need and that in any event, the bill has not been presented by the Bank to the appellant as such drawee so that he would be entitled to the protection of the provisions of the Negotiable Instruments Act. He submitted that the Court below had acted rightly in dismissing the suit completely.

5. Before proceeding further, it may be mentioned that Exhibit A-2 is a document produced by the plaintiffs. In that document, several bills drawn against the defendants are mentioned along with the respective amounts due under each of those bills. Bill No. 135 is one those bills and the amount due thereunder is Rs. 1,572,57. The total amount due from the defendants in respect of the several bills came to Rs. 26,401.15. The defendants had paid by demand drafts an aggregate of Rs. 25,901.15. There was thus a balance of only Rs. 500, which according to the defendants would alone be due. Even with reference to this sum, the defendants pleaded certain adjustments which have been rejected by the Court below. Therefore, on the basis of Exhibit A-2, itself, the amount due would only be Rs. 500 with interest.

6. The suit does not appear to have been filed on the basis of a bill of exchange or a hundi under Bill No. 135 for a sum of Rs. 1,575.57, having been drawn against the defendants. In paragraph 4 of the plaint it is stated that the sum of Rs. 1,573-67 was due in respect of the said bill. However, on a reference to Exhibits A-4 and A-5, it is found that the amount due under draft No. 2594, dated 28th July, 1969 (Invoice No. 135) was Rs. 1,573 67. That was admittedly the amount with reference to which the present suit has been filed.

7. The question that now arises for consideration is whether the plaintiffs

would be entitled to the amount due under Exhibits A-4 and A-5. Though the original bill of exchange has not been marked, it is common ground that the plaintiffs have been mentioned as 'drawee in case of need' in the said bill. The plaintiffs would, however, have to pay only that amount which remained unsatisfied with reference to the said bill and cannot be made to pay any larger amount as claimed from the defendants As already seen, a sum of Rs. 26, 401-15 was the total of the several bills and a sum of Rs. 25,901. 15 had been paid. It was not suggested that there was any independent transaction that was not covered by Exhibit A-2. There was thus a balance of only Rs. 500 and if really the plaintiffs paid anything more to the Mills, then it cannot be on account of the defendants. Therefore, the plaintiffs would be entitled only to a sum of Rs. 500 with interest after 45 days from the due date, 30 days from the date of draft was given as the grace period and there was a retention period of 15 days after due date The date of the invoice is 28th July, 1969, and therefore, after the expiry of the 45 days period from that date, the defendants would have to pay interest as agreed to between the parties.

8. The question that now remains to be considered is whether the plaintiff is entitled to recover the said sum. One of the contentions taken before the lower Court was that the plaintiff is in the position of a volunteer and that the plaintiff cannot seek to recover the amount which he volunteered to pay. Ordinarily, when an amount is due under a bill of exchange, a person should make the claim either as a holder in due course or as an endorsee. In the present case, there is no endorsement.

9. The meaning of the word 'drawee in case of need' has been defined in section 7 of the Act as follows:

> "The maker of a bill of exchange or cheque is called the 'drawer', the person thereby directed to pay is called the 'drawee'. When in the bill or in any endorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a 'drawee' in case of need."

10. It is not necessary to refer to the rest of the provision. Section 91 reads—

> "A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted."

Section 115 which deals with the position of a drawee in case of need provides :

> "Where a drawee in case of need is named in a bill of exchange, or in any endorsement therein, the bill is not dishonoured until it has been dishonoured by such drawee".

Section 116 provides "A drawee in case of need may accept and pay the bill of exchange without previous protest."

11. There is another provision, namely, section 37 which may be referred to in this context. It runs as follows :

> "The maker of a promissory note or cheque, the drawee of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as securities for the maker, drawer or acceptor, as the case may be."

12. It is on the basis of these provisions the learned counsel for the appellant contended that in the case of a drawee in case of need like the appellant here, he is put in the statutory position of a surety and that he is entitled to recover from the defendants. In this connection, the lower appellate Court has referred to the decision in *Perianna Marakayar and Sons* v. *Banians and Company*[1]. That was a case where the plaintiffs were dubashes or banians who guaranteed the due performance of a contract for purchase of goods. They were not parties to the particular contract between the trading company and a customer. The customer was not also a party on the contract of guarantee entered into between the plaintiffs and the trading company. The trading company supplied goods to the customer

1. (1926) I. L. R. 49 Mad. 156: 23 L. W. 432: A. I. R. 1926 Mad. 544.

who refused to take them on the ground that the company did not comply with certain terms of the contract. The account of the dubashes, namely, the plaintiffs in that case, was debited and the dubashes (plaintiffs) sued the company to cancel the debit or in the alternative to recover the amount debited from the customer who were in default. It was held that a contract of guarantee, unlike one of indemnity, required the concurrence of three parties, namely, the principal debtor, the creditor and the surety and that the surety should undertake the obligation at the request, express or implied, of the principal debtor. On the facts of that case, it was held that there was no contract of guarantee as there was no privity of contract between the principal debtor, creditor, and the surety. It was taken to be a contract only of indemnity. It was also held that in a contract of indemnity, the indemnifier could not, on performance of the obligations of the debtor, in the absence of an assignment from the creditor, sue, in his own name, the debtor as there was no subrogation in law to him of the creditor's rights.

13. The learned counsel for the appellant sought to distinguish this decision on the ground that in the said case there was no question of any bill of exchange which was the subject-matter for consideration. It was also pointed out that the plaintiff in that case did not claim any rights based on his being drawee in case of need. This contention appears to be well-founded and therefore, the present case cannot be taken as concluded by the above-cited decision.

14. If, in the present case, there was an assignment of the bill in favour of the plaintiffs there would have been no difficulty. If the plaintiffs had joined with Lakshmi Vishnu Cotton Mills Limited, and filed the present suit, then also there would have been no difficulty as the case would have squarely fallen with the scope of the decision in *Perianna Marakayar and Sons* v. *Banians and Company*[1]. Therefore, the point boils down to this, namely, whether the plaintiff when it paid the Mills, was only in the position of a volunteer so that it cannot claim from the defendant the amount that he paid over to the Mills.

15. It is in this context that section 37 appears to be material. The plaintiff is the acceptor of the bill of exchange. The fact that he did not pay the amount due to the bank is not material. The payment was made to the Mill only on account of the bill and the payment was made only in his capacity as an acceptor in case of need. There is a statutory recognition in the provisions of the plaintiff as a surety with respect to the amount which was paid towards the amount due under the bill of exchange. As he is in the position of a statutory surety, it is not necessary that there should be a kind of tripartite contract as envisaged in the decision of *Perianna Marayakar and Sons* v. *Banians and Company*[1]. In this case, it can also be said that there is an obligation cast on the plaintiff as an acceptor in case of need to pay the bill. The knowledge of the defendant about the plaintiff being an acceptor cannot be disclaimed as the bill carried on its face the name of the plaintiff as an acceptor in case of need. The plaintiff is not in the position of a volunteer. The plaintiff was also interested in the payment as he was liable to pay the amount to the mills. Section 69 of the Contract Act would also be applicable. Looked at from any angle, the plaintiff can thus claim the amount from the defendant. There is no equity in the defence. It is not disputed that there is liability to pay the amount due under the statement of accounts. However, the plaintiff's claim would be accepted only to the extent of the amount decreed by the trial Court as the balance had already been paid by the defendant to the mills The result is that the appeal is partly allowed and the decision passed by the trial Court is restored. The plaintiff will be entitled to proportionate costs throughout.

S. J. —— *Appeal partly allowed.*

1. (1926) I. L. R. 49 Mad. 156: 23 L. W. 432: A. I. R. 1926 Mad 544

1. (1926) I. L. R. 49 Mad. 156: 23 L. W. 432; A. I R. 1926 Mad. 544.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Chinna Andi Pandaram ... *Appellant**

v.

The Commissioner, Hindu Religious and Charitable Endowments (Admn.) Department, Madras-3 and others .... *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 6 (1), Hereditary Trustee—Claim by hereditary poojaris of temple to the office—Small temple having property—Poojaris and their ancestors managing the affairs of the temple and doing pooja services hereditarily – Expenses on certain occasions incurred by villagers—Claim of pujariship and trusteeship as residing in the family—Poojaris whether hereditary trustees of the temple.

Held, that in the instant case, the plaintiffs had not produced any account book to show that they had acted as trustees and were meeting the expenses for pooja and other expenses of the temple. The title deeds only showed that their ancestors were the managers for the time being and also served as poojaries. The relationship of the plaintiffs to the original grantee poojari has not been properly explained. The grant was for the performance of the pooja and doing "Sukravara and Somavara" "Kattalai". The property was described as "Pillayar Manyam" and "Pidari Amman Manyam". There was no evidence on record to show that the ancestors of the plaintiffs were acting as trustees in addition to their performing duties as poojaries. Thus the plaintiffs had not established their case by acceptable evidence that they were the hereditary trustees of the temple though they were the hereditary poojaries of the temple. [*Para.* 13]

Cases referred to:—

Babu Gurukkal v. *The Commissioner for Hindu Religious and Charitable Endowments Board,* (1964) 1 M. L. J. 384; *State of Madras* v. *Krishnaswami,* (1964) 1 M. L. J. 369; *Chinniah* v. *Deputy Commissioner, H. R. and C. E.,* (1965) 1 M. L. J. 144; *Muthuswami Gurukkal* v. *Aiyaswami Thevar,* (1964) 2 M. L. J. 560; *Ramaswami* v. *Ramaswami,* (1892) 2 M.L.J. 251; *Andavar* v. *Periathambi Padayachi,* (1951) 2 M. L. J. 232.

Appeal against the decree of the Court of the Principal Subordinate Judge, Salem, dated 13th August, 1975 and made in Original Suit No. 305 of 1970.

D. Dinakaran, for Appellant.

The Government Pleader, for 1st Respondent.

K. Sarvabhauman and *R. Nandakumar,* for Respondent.

The Court delivered the following

JUDGMENT:—This is an appeal by the second plaintiff Chinna Andi Pandaram against the judgment and decree dated 13th day of August, 1975 in O. S. No. 305 of 1970 on the file of the Court of the learned Principal Subordinate Judge of Salem, dismissing the suit filed by him along with one Komara Pandaram alias Komarandi Pandaram for declaration that they are the hereditary trustees of the Vinayagar, Mari Amman and Pidari Amman temples of Laddivadi village, after setting aside the order of the Commissioner, H R. and C. E. Board, in Appeal No. 63 of 1967 on his file and for a declaration that they are entitled to enjoy the suit properties hereditarily and for a permanent injunction restraining the defendants 2 to 7, the trustees appointed by the H R. and C. E. Board, from interfering with their possession and enjoyment of the suit properties.

2. The case of the plaintiffs as put forward by them in the plaint is that Survey No. 111/2 of Laddivadi village was granted as devadayam to the Vinayagar temple at Laddivadi under title deed No. 695, that S No. 240 of that village was granted as devadayam land in favour of Mari Amman and Pidari Amman temples at Laddivadi village as per title deed No. 696 and that

*A .No. 487 of 1977. 30th July, 1980.

the plaintiffs and their ancestors were in possession and enjoyment of these properties as poojaries-trustees of the temple for over 150 years. It is further alleged in the plaint that even at the time of the Inam Commission enquiry in 1863, the ancestors of the plaintiffs were found to be the persons enjoying the lands on behalf of the deity, that the pattas granted in 1880 and kist receipts are also to the same effect, that the management of the temples and its day-to-day administration were carried on by the plaintiffs as hereditary trustees and that the Area Committee, Salem, by its resolution dated 25th January, 1965 appointed defendants 2 to 6 as non-hereditary trustees of these temples. The plaintiffs preferred revision against the resolution of the Area Committee and also filed an application under section 63 (b) of Madras Act (XXII of 1959), to the Deputy Commissioner, H. R. and C. E. in O. S. No. 7 of 1966 for a declaration that they are the hereditary trustees of the above temples. The case of the plaintiffs that they are the hereditary trustees of those temples was upheld by the Deputy Commissioner and thereafter they did not press the revision petition before the Commissioner. The defendants 2 to 6 who were aggrieved by the order of the Deputy Commissioner preferred Appeal No. 63 of 1967 to the Commissioner and the Commissioner allowed this appeal by his order dated 3rd January, 1970. It is further alleged in the plaint that the plaintiffs and their ancestors were in uninterrupted enjoyment of the temples and the suit properties for over 150 years and their hereditary right to be not only poojaries but also trustees of the temples cannot be questioned by any one so long as they render service to the temple. The suit lands were taken over by the Government under the Minor Inams Abolition and Conversion into Ryotwari Act (XXX of 1963) in 1965. In that enquiry also, the Settlement Tahsildar recognised the plaintiffs as the hereditary poojaries and trustees. It is further stated in the plaint that the order of the Commissioner setting aside the order of the Deputy Commissioner is based on the ground that the villagers made some collections and payments in connection with some festivals and therefore they were in possession and management of the temple properties and that this finding is not correct. According to the plaintiffs, the temple being a public temple, the poojari or trustee cannot prevent the public spending some money during festivals and this will have no bearing on the question of hereditary trusteeship. According to the plaintiffs, as they were the hereditary poojaries and hence they were in possession and enjoyment of the suit properties in lieu of their service to the temple. It is also stated in the plaint that the defendants 2 to 6 are intent upon entering the suit properties after the order of the Commissioner and that they have no right to interfere with the possession and enjoyment of the properties by the plaintiffs. The seventh defendant was subsequently appointed as a trustee.

3. On the other hand, the case of the first defendant the Commissioner, Hindu Religious and Charitable Endowments, Madras, as contended in the written statement is that his order is supported by oral and documentary evidence and is not liable to be set aside, that the Inam Commission did not find that the ancestors of the plaintiffs were the owners of the suit lands, nor these lands were given to the deities through the poojaries and that the plaintiffs or their ancestors are not found to be the hereditary trustees or managers of those temples. It is also contended that the Inam Fair Register only shows that the ancestors of the plaintiffs were poojaries and nothing else, that poojaries are different from trustees, that the possession and enjoyment of the suit lands by the ancestors of the plaintiffs was only as poojaries and that there is documentary evidence to prove that the plaintiffs and their ancestors were not managing the day to-day-affairs of the temple. According to the first defendant, the order of the Settlement Tahsildar recognising the plaintifffs as trustees was passed without notice to defendants 2 to 6 and he is not the competent authority to decide this question. The order of the Deputy Commissioner, H. R. and C. E., according to the first defendant, having been set aside, cannot be read as part of the plaint. According to the first defendant, there is sufficient documentary evidence to prove that the villagers were in complete management and control of the temple, that the entry in column 7 of the Inam Statement shows that the lands were granted for the purpose of pooja and for Sukrawara Kattalai and Somawara Kattalai and also as Pillayar Manyam and Pidari

Amman Manyam. It is further contended by the first defendant that the ancestors of the plaintiffs were never described as trustees and much less as hereditary trustees. Acording to the first defendant, the documents produced by the villagers before him established that the temples were managed by the villagers who paid salaries to the plaintiffs' ancestors on annual basis and that these accounts are 45 years old. According to the first defendant, the plaintiffs have signed these entries. The classification of the land as devadayam shows that the grant was to the deities and that the plaintiffs and their ancestors were only poojaries and were not managing the temples as hereditary trustee·

4. The case of the 5th defendant Velappan as put forward in his written statement which was adopted by the other defendants is that the deities own the lands as per the Inam Title Deeds 695 and 696, that the Inam Title Deeds mention that Poojari Selli was in possession in Fasli 1209, Poojari Sriranga in 1242 and Poojari Komara in 1257 and Komarandi and Arasalai at the time of the inam enquiry. According to the 5th defendant, those persons are not the ancestors of the plaintiffs and the geneological tree filed along with the plaint is not true as it does not give the year of death of various persons and the names of their heirs. The Inam Register. according to the 5th defendant, establishes that the grant was in favour of the deity and that the persons mentioned therein were in possession on behalf of the deity. The pattas and kist receipts show this position. According to the 5th defendant, the management and the day-to-day administration of the temples were always in the hands of the villagers and that the plaintiffs, though poojaries, were not the hereditary trustees and that the plaintiffs were also not in continuous possession as poojaries. According to the 5th defendant, the lands being Devadayam lands, the poojaries cannot be in undisturbed possession so long as they render service to the temples. The lands were leased by the plaintiffs to one Chinna Goundar and the plaintiffs are not in actual physical possession. The deity was granted patta in the settlement proceedings and it is untenable that the grant was to be enjoyed through the plaintiffs who were hereditary trustees and poojaries. According to th 5th defendant, the order of the Tahsilda was passed in his absence and as such the observations therein about the hereditary right of the plaintiffs to be trustees are not binding on these defendants. The defendants 2 to 6 are respectable persons owning substantial properties and are the validly appointed trustees. Chinna Gounder, the lessee under the plaintiffs is a necessary party to the suit.

5. On the above pleadings the trial Court framed the following issues for trial :—

1. Whether the plaintiffs are the hereditary trustees as alleged ?

2. Whether the plaintiffs are the hereditary poojaries as alleged ?

3. Whether the inam grant is in lieu of the service to the temple by the poojaries ?

4. Whether Chinna Goundar is a proper and necessary party to the suit ?

5. Whether the suit is bad for non-joinder of party of Chinna Gounder ?

6. To what relief, if any are the plaintiffs entitled ?

6. The second plaintiff, the appellant herein examined himself as P. W 1 before the trial Court P. W. Chinnathambi Gounder was also examined on behalf of the plaintiffs. On behalf of the plaintiffs, Exhibits A-1 to A-22 were filed before the trial Court. The 5th defendant Velappan examined himself as D. W No. 4. D. W. No. 1 Nallianna Gounder D. W. No. 2 Sengodan and D. W. 3 Palanisami were examined on behalf of the defendants Exhibits D 1 to D-5 were filed on the defendants.

7. On a consideration of the evidence, the trial Court found under issue Nos. 1 and 2 that it cannot be held that the plaintiffs-hereditary poojaries also acted as the trustees of the temples and that the plaintiffs are not the hereditary trustees, though they are the hereditary poojaries of the temples Under issue No. 3, the trial Court found that the Inam grant is only to do pooja service in the temple and not to the poojaries for services to the temple. Under issue Nos. 4 and 5 the trial Court found that Chinna Gounder is not a necessary party to the suit nor is the

suit bad for non-joinder of that person. Under issue No. 6, the trial Court found that the plaintiffs are not entitled to any permanent injunction against the deity or the trustees appointed by the proper authority to manage the affairs of the deity from interfering with their possession and enjoyment of the suit properties. In the result, the suit was dismissed. There was no order as to costs.

8. Aggrieved by the above decision of the trial Court, the second plaintiff has come forward with this appeal *inter alia* contending that the trial Court failed to note that there is documentary evidence on the side of the plaintiffs to prove that they have been not only the hereditary poojaries but also hereditary trustees even before the time of Inam Commission According to the appellant, the lower Court ought to have found that the plaintiffs were hereditary trustees It is also contended on behalf of the appellant that Exhibits B-1 to B-5 will prove inter-meddling by the public in the affairs of the temple.

9. The main contention raised on behalf of the appellant in this appeal is that the plaintiffs are the hereditary trustees of Vinayakar, Mariamman and Pidariamman temples of Laddivadi village and in that capacity, they are entitled to enjoy the suit properties.

10. It is common ground that the plaintiffs are the poojaries of the temples and that their ancestors were also doing service. Exhibit A-1 geneological tree filed on the side of the plaintiffs traces the ancestry of the plaintiffs upto Komarandi and Arasalai. It shows that the first plaintiff Komarandi Pandaram and the second plaintiff Chinnandi Pandaram have one Kumarandi Pandaram as their common ancestor. It is also shown in Exhibit A-1 that the said Kumarandi Pandaram and Arasalai Pandaram are brothers and that they are sons of one Seeranga Pandaram. Arasalai Pandaram had no sons. Kumarandi Pandaram has three sons by name Seeranga Pandaram, Arumugha Pandaram and Karupandi Pandaram. Seeranga Pandaram had a son by name Palaniandi Pandaram whose second son is the second plaintiff Chinnandi Pandaram. The first plaintiff is the son of Karupandi Pandaram. Arumugha Pandaram had no issues. Exhibits A-2 and A-3 are the extracts of Inam register relating to T. D. Nos. 695 and 696. Kumarandi Pandaram and Arasalai Pandaram are mentioned as poojaries. Exhibit A-2 shows that the Inam is devadayam and it has been given for the support of Pilliar at Laddivadi. Under the column particulars regarding owner, the names of Kumarandi and Arasalai find a place. In Exhibit A-3 under the column description of Inam it is stated that the property has been given for the support of Mariamman and Pidariamman temples at Laddivadi village Under the column particulars regarding the owner, the names of Kumarandi and Arasalai are mentioned. In it, the name of the original grantee is found as Mariamman Pidari poojari Chelli. It is also an Inam mentioned as devadayam. Exhibit A-4 is the title deed granted to the manager for the time being of the pagoda of Pilliar by the Inam Commissioner in the year 1864. Exhibit A-5 is also the original title deed granted to the manager for the time being of the pagoda of Mariamman and Pidariamman temples in the village of Laddivadi in the Taluk of Namakkal on 13th May, 1864 Exhibit A-6 is the patta granted in favour of Shri Mariamman and Pidariamman temples under title deed No. 696. Exhibit A-7 is the patta granted in favour of Shri Pilliar Temple under title deed No 695. Exhibits A-8 and A-9 are the pattas issued for fasli 1289 in respect of these lands. They arei in the name of poojari Kumarandi. Exhibits A-8 and A-9 are of the year 1880. Exhibt A-10 is the statement made by Kumarandi and Arasalai before the Inam Commissioner in the year 1863. Exhibit A 11 is also a statement made by Kumarandi and Arasalai before the Inam Commissioner in the year 1863. These statements show that the lands were granted for the purpose of performing the poojas to the temples and poojas are being performed regularly Exhibit A-12 dated 6th March, 1923, is the mortgage deed executed by Kumarandi and others in favour of one Nachi Goundar. Exhibit A-13 is

the mortgage deed executed to Palaniandi Goundar by Kumarandi in the year 1936. Exhibit A-14 is the lease deed executed by Kumarandi and Palaniandi on 7th November, 1925. Exhibit A-15 series consist of kist receipts from fasli 1322 onwards.

11 The defendants have filed Exhibits B-1 to B-5, accounts relating to collections from villagers and from lease of the village fishery rights etc., and the expenses incurred from and out of these amounts in connection with the affairs of Mariamman and Pidariamman temples. Exhibit B-1 is the chitta book maintained by Mariamman and Pidariamman koil Exhibit B-2 is the chitta relating to the collections made for the temple festivals. Exhibit B-3 is the day book. Exhibit B-4 is the ledger. Exhibit B-5 is the book showing the accounts for the expenses incurred relating to Kumbabishekam of Pidariamman temple in the year 1958 and also relating to the accounts of the temple till the year 1962. These account books, Exhibits B-1 to B-5 contain entries which show that Palaniandi and Kumarandi Pandaram agreed to perform poojas for one year at Rs. 75 for Mariamman and Pidariamman temples and also acknowledged the receipt of the same, that the amounts were spent for the purchase of deities to these persons, that the amounts were given to them for lighting the temple 'Nanda vilakku, and also for the expenses relating to the pooja performed on Amavasai days and other festival days and Abishekam expenses. There are entries in these account books relating to the amounts spent for making-charges of Utsava Vigraham as well as amounts spent towards repairing the building and expenses for the erection of pandals and payment to drummer, tailor, devadasi and various other services rendered at the time of the festival These account books show the expenses relating to Mariamman and Pidariamman temple for a period of about 45 years. Exhibit B-1 contains entries relating to the expenses incurred for the Tamil year Prabhava. Exhibit B-2 contains entries relating to the Tamil year Ruthrothkhari, Rakthaksbi and Kurothana. Exhibit B-3 contains entries of the Tamil year Thunthubi, Vibhava, Sukkila, Pramodhootha, Prajothpathi. Angirasa, Bhava, Uva, Eswara Vekuthanya and Srimukha. Exhibit B-4 contains entries relating to the Tamil year Thundhubi, Krothana, Rakthakshicet. Exhibit B-5 shows the entries of the year 1958 to 1962.

12. On behalf of the appellant, it is contended that the plaintiffs and their ancestors were managing the affairs of the temple and performing pooja services hereditarily for nearly a century and that the expenses in connection with the festivals, abishekam or the erection of the chariot incurred by the villagers will not show that they took part in the management of the affairs of the temple. It is further contended on behalf of the appellant that only on the ground that the hereditary poojaries allowed the villagers to spend for the temple on some occasions will not show that the affairs of the temple were managed by the villagers. In this regard, it is also pointed out that though the villagers spent money on certain occasions like festivals, yet the plaintiffs and their ancestors were not required to account for the income from the Devadayam land to the villagers which they were enjoying. In support of his contention, the learned counsel for the appellant refers to the decision in *Babu Gurukkal* v. *The Commissioner for Hindu Religious and Charitable Endowments Board, Madras*[1], for the following proposition :

> "Small temples in South India often have only poojaris who, by long custom or usage, look after the affairs of the temples where they serve as gurukkals ; they function in a dual capacity, namely, poojari-cum-trustee. Such a combination of offices is not necessarily opposed to public policy or contrary to law. In the case of such small temples, there is a presumption that the pujari himself is hereditary trustee and there is nothing illegal in the hereditary trusteeship and poojariship being combined in the same person in such small temples. When the documentary evidence including the Inam

1. (1964) I M. L. J. 384.

Register shows that for more than three generations, the poojarship-cum-trusteeship in a temple was in the same family and descended from father to son and there is no evidence to show that this was not so or could not be so, the presumption is all the greater, and it must be held that the members of the family are hereditary trustees of the temple."

The decision in *State of Madras* v. *Krishnaswami*[1] is relied on for the following proposition :

"From the mere fact of trusteeship of a temple being held by a family hereditarily for three or four generations, an inference that the trusteeship was hereditary in character cannot be drawn as an invariable conclusion. Where in the case of a temple the management is found to have passed from one poojari to another for a long time and subsequently a well-wisher of the temple (abhimani) acquired the temple lands by purchase from the last poojari along with the poojariship, and the purchaser and his successors take over the trusteeship, that would not establish the ingredients of a hereditary right to the trusteeship.

In the case of small temples it often happens that the poojari who is mentioned in the Inam Register as the person in enjoyment, also looks after the affairs of the temple and acts as the trustee as well and the members of the same family happen to be the poojari and trustee for several generations ; and when taking advantage of that position the poojari sells the lands to a stranger who thereafter looks after the lands and performs the pooja and festivals for several years, that would only show that the poojari has been to all intents and purposes the trustee as well. But that would not be sufficient to infer that the purchaser and his descendants who subsequently manage the temple for several generations are entitled to be hereditary trustees of the temple. Nor would the fact that contributions were levied by the Board at the rate leviable in the case of excepted temples which have hereditary trustees, lead to the conclusion that the trusteeship is hereditary in character or prevent the Board from raising an issue about the hereditary nature of the trusteeship, when there is a contest about it later on.

The devolution of office for generations from son to grandson is no doubt *prima facie* evidence that the office devolves by succession according to the laws of inheritance. So also the fact that members of a particular family held the office of Dharmakartha continuously for more than a century and there was assertion by them that it was hereditary would be good evidence that the office is hereditary. But any such *prima facie* inference will be negatived by evidence to the contrary."

The learned counsel for the appellant also refers to the decision in *Chinniah* v. *Deputy Commissioner, H. R. and C. E., Thanjavur and others*[1], for the following proposition :

"Where a particular temple is owned by the State or the founder it would negative the contention that the trusteeship thereof vested in an outside agency unless it be proved that the State or the founder have vested the trusteeship in such agency. The mere fact that the poojaris of a temple, though hereditary poojaris have been in custody of the temple jewels or in charge of its day-to-day management or collected subscriptions and celebrated certain festivals, would not make any difference and cannot show that the poojaris were also functioning as trustee.

Though grants of lands by the State in favour of the poojaris for the performance of daily worship and festivals, etc., in the temple taken by itself might lend support to the contention that the poojaris were also in a sense trustees of the temple as well, still where there is clear evidence to show that the State never intended to part with its right, such grants can at least be regarded as creating a special trusteeship for a limited purpose mentioned therein. In regard to other matters of management it is the State that will be the superior or general trustee as it was in the position of the founder-owner of the institution."

1 (1964) 1 M. L. J. 369.

1. (1965) 1 M. L. J. 144.

The decision in *Muthuswami Gurukkal* v. *Aiyaswmi Thevar and sixteen others*[1], is referred to for the following proposition :

"There is nothing illegal in hereditary trusteeship and pujariship being combined in the same person, especially in the case of small temples where there has been no interference or control by any of the villagers of the place. In the case of small village temples, where the temple property is of insignificant value and the income is hardly sufficient even to meet the routine expenses of the temple, if the archaka or the poojari is left in management of the temple lands and the affairs of the temple without any interference by any of the villagers for a long number of years, it has to be presumed that with the consent and acquiescence of the worshippers of the village the pujari is the trustee as well. In such a case, it must be held that the poojari managing the lands and affairs has made out his right to hereditary trusteeship and the interests of the temple are not likely to suffer, when the person concerned admits that the lands, are temple lands and has never set up any rights to them as his own property. (*Ramaswami* v. *Ramaswami*[2], *Andavar* v. *Periathambi Padayachi*[3], relied on.)"

The learned counsel for the appellant also refers to the decision in *Andavar* v. *Periathambi Padayachi*[3], for the following proposition :

"Where the immovable properties owned by certain deities were of inconsiderable value and the only act of management which could be exercised in relation to them, namely, the payment of kist was being done by the poojari, where all the movable properties which were of considerable value had been in the custody of the poojari and there is nothing to show that any control was exercised over him as regards the manner in which he disposed of the collections and contributions made for the annual festival by the worshippers, the proper inference to be drawn is that the poojari continued the office of trustee also in himself."

13. In the instant case, the plaintiffs have not produced any account book to show that they had acted as trustees and were meeting the expensor for pooja and other expenses for the temple. As already seen, the title deeds only show that their ancestors were the managers for the time being and that they also served as poojaries. It is also relevant in this connection to note that the relationship of the plaintiffs to the original grantee, poojari Selli, has not been properly explained. It is also seen that the grant was for the performance of the pooja and doing 'Sukrawara and Somawara kattalais' The property is described as 'Pillayar Manyam' and 'Pidari Amman Manyam' Thus, we find that there is no evidence on record to show that the ancestors of the plaintiffs were acting as trustees in addition to their performing the duties as poojaries. The entry in the account book Exhibit B-3 at page 14 shows that from 31st 'Aani' to the next year Raktakshi 31st 'Aani' Kumarandi and Palaniandi were to be given Rs. 75 and for that they have been given Rs. 30. This entry has been signed by both of them The said entry read as follows :

"14 சென்ற ஆனி 31 முதல் ரத்தாட்சி வருடம் ஆனி மாதம் 31 வரையில் வருஷம் 1க்கு 75ரூ வீதம் பேசி ஆண்டி கொமரன். பழனி இவர்களுக்கு கொடுத்தது ஷெயார்களுக்கு பத்து...... .... ரூ30.

(ஒப்பம்) கொமற ஆண்டி,
பழனியாண்டி

Pages 94 and 95 of Exhibit B-3 shows that Andikumaran and Palaniandi were given a pair of dhoties. This shows that they were treated only as poojaries. Page 14 of Exhibit P-3 contains the signatures of Komarandi and Palaniandi Exhibits B-3 also contains entries relating to the remuneration paid to Andi Kumaran for performing poojas. Entries relating to expenditure for welding the hall of the Mariamman Temple, purchase of locks, purchase of pooja samans such as Thiruvachi, Thambalam, Sulavutham Sarivan etc., also find a place in Exhibit P-3. At page 15 of Exhibit D-3, there is an entry dated 30th of Purattasi, Ruthrothkari showing that remuneration

1. (1964) 2 M. L. J. 560.
2. (1892) 2 M. L. J. 251.
3. (1951) 2 M. L. J. 232.

was paid for levelling the floor of the temple on its western side. There are also entries in Exhibit P-3 which show that the villagers have been managing the temple by making local collections. Thus Exhibit P-3 proves that the villagers were managing the temple and that the ancestors of the plaintiffs were acting only as poojaries. Nowhere in these account books the ancestors of the plaintiffs are mentioned as trustees, much less as hereditary trustees. The plaintiffs have not produced any record to show that their ancestors were managing the temple.

14. The evidence of P. W. 1 shows that the income from the lands was not sufficient to perform the day to day poojas and that the income from the lands was supplemented by the collections made by the villagers as spoken to by the witnesses examined on behalf of the defendants P W. 1 states in his evidence that the income from the land is only Rs. 300/ per annum and that the same is shared between the four families of the poojaries, that for daily pooja in the temples 3/4 measure of rice was required and the expenses will come to Rs. 10/ or Rs. 12/ per day.

15. Exhibits A-10 and A-11 are statements made by Kumarandi and Arasalai before the Inam Commissioner in the year 1863. It is stated therein that the income from the properties was utilised for pooja services. From this, it cannot be held that the property was not endowed to the deity but the grant was only for the poojari service. In the instant case, the grant was in favour of the deity and as such, it cannot be held that because of the long service rendered by the plaintiffs and their ancestors, who were in possession of the property, the same was granted for poojari services alone. The Inam register also shows that the property is registered in the name of the deity. Therefore, it is clear that the Inam grant is only to Pooja service in the temple and not to the Poojaries for their service to the temple.

16. P. W. 1 Chinnandi Pandaram has stated in his evidence that the annual income from the land is about Rs. 300 and with this income, the members of the four families are maintained. He also states in his cross-examination that there is no account maintained for the amounts spent towards purchasing paddy. He also admits that the temple was not repaired by them. P. W. 2, Chinnathambi Goundar has stated in his evidence that he is acquainted with the plaintiffs and that they were performing poojas in Mariamman, Pidariamman and Pilliar temples. P W. 1 Nallianna Goundar who is aged about 75 years states in his evidence that for administration of the temples, the inhabitants of the five villages are contributing and that four persons from each of the five villages are administering the affairs of the temples. According to him, the daily expenses towards Neivethiam and pooja are met by the villagers. He specifically states that the affairs of the temple are not administered by the plaintiffs. He also states that the members of the four families of the plaintiffs are living out of the income from the land He further states that the plaintiffs were performing poojas in the temples at the time of the suit. Prior to them, it was their ancestors who were performing the poojas in the temples According to him, as and when Abishekham and Pongal ceremonies are performed, remuneration was given to the poojari by the villagers. According to him, it is only the villagers who had contributed for the extensive repairs that were carried on in the temple such as providing verandah, constructing gopuram as well as compound walls. D. W. 2 Chengodan who is aged about 65 years has also stated in his evidence that the repairs of the temples were effected by the people belonging to the five villages and that the festivals were also celebrated by them. According to him, the plaintiffs were enjoying the income from the temples. He has denied the suggestion that the plaintiffs were spending money for white-washing the walls of the temples. D W. 3 Palanisami has stated in his evidence that the villagers belonging to the four villages in Laddivadi have been collecting money and celebrating the annual festivals in the temples. He further states that the expenses of the temples were incurred out of the said collections made by the villagers. D. W. 4 Velappan also states in his evidence that the affairs of the temples have been administered only by the villagers and that it is the villagers who have been incurring expenses towards festivals as well as effecting repairs in the temple and this they did

by collecting money from the people residing in the four villages. D W. 4 had produced Exhibits B-1 to B-5 before the Deputy Commissioner, H. R. and C. E. They were given to him by Chengoda Goundar. The entries in these account books were written by one Ramachandra Iyer. The said Ramachandra Iyer is not alive. In the account books relating to the years 1958 to 1962, D. W. 4 has made endorsements. D W. 4 futher states that the plaintiffs have been leasing the lands and enjoying the same. They are getting about Rs. 300 per annum. With the said income, four families are maintained. He has denied the suggestion that out of the income from the lands, some portion of the same is spent for the temples. According to him, during festival seasons Pandarams were given dhoties and clothes, rice and money. In his cross-examination, D W. 4 has stated that it is only the villagers who give money for performing poojas in the temples. D. W. 4 is aged 57 years. D. W. 4 also states that the vigraham in the temples as well as the pooja samans are all in the custody of the villagers.

17. In the Madras Hindu Religious and Charitable Endowments Act, 1960 (Madras Act XII of 1959), the office of 'hereditary trustee', defined under section 6 (11) is as follows :

> " 'hereditary trustee' means the trustee of a religious institution, the succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force :"

In this appeal, it is not in dispute that the plaintiffs are the hereditary poojaries of the temple. The property in the instant case were given to the deity for pooja service and was not a personal grant to the ancestors of the plaintiffs burdened with pooja service to the deity. On a careful consideration of the entire evidence in this case, I find that the plaintiffs have not established their case by acceptable evidence that they are the hereditary trustees of the temple. I hold that the plaintiffs are not hereditary trustees of the temple, though they are hereditary poojaries of the temple. There is no merit in the appeal. The appeal is dismissed. But there will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, CJ. and V. Ratnam, J.*

The State Transport Authority, Chepauk. Madras-9 ... *Appellant**

v.

S. Chinnaraju ... *Respondent.*

Motor Vehicles Act (IV of 1939), section 63, Tamil Nadu Motor Vehicles Rules (1940) and rule 163 (b) *as amended in 1978 and 1979—Scope and effect of.*

Rule 163 (*b*) of the Tamil Nadu Motor Vehicles Rules, 1940, provides *inter alia* that when the applicant to unable to produce the certificate of registration on the date of the application for a permit for the reason that he is not on that date in possession of a vehicle duly registered, or for some other reason, the Transport Authority or the Tribunal as the case may be shall grant him 4 months' time to be reckoned from the date of the receipt of the orders passed by them, on the application, to produce the certificate of registration of the vehicle before the Transport Authority which has to issue the permit in order that particulars of registration mark may be entered in the permit. The grantee of a National permit was in the proceedings of the State Transport Authority dated 9th May, 1978, and received by the grantee on 13th May, 1978, stated that the grantee should produce the registration certificate of the vehicle within two months from the date of the receipt of the order. There was no reference in the order to any rule framed under the Motor Vehicles Act.

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*W. A. No. 516 of 1979. 10*th January*, 1980.

On 7th July, 1978, the grantee applied for extension of time. Acting under rule 163 (*b*) the Authority granted time up to 12th September, 1978, with a rider that no further time would be granted. The grantee failed to produce the certificate within that time and applied for further extension. This was refused and the sanction already granted was revoked. In writ proceedings to quash the order, a single Judge allowed the petition holding *inter alia* that the original grant of extension for 2 months was *ex gratia* and that the statutory time limit of 4 months prescribed under rule 163 (*b*) commenced only on 20th July, 1978, when the Authority expressly referred to that Rule. The correctness of the conclusion was challenged on appeal.

Held: Rule 163 (*b*) merely uses the expression "four months' time" and it does not say whether the said four months' time should be given at a time or in aggregate on different occasions by way of extending shorter time already granted. When rule 163 (*b*) refers to four months' time, it does not say whether that time should be granted at one instance or by way of subsequent extensions the aggregate periods totalling to four months. Whenever a statutory authority exercises any power and performs any function, the said exercise and performance is relatable to the statutory provision which confers the power and authorises the exercise of function even though the proceedings themselves do not mention the particular statutory provision. Consequently no inference can be drawn from the fact that in the proceedings dated 9th May, 1978, no reference was made to rule 163 (*b*) and that such a reference was made only in the proceedings dated 20th July, 1978. Even assuming for the sake of arguments that under rule 163 (*b*) the appellant was bound to give four months' time by his proceedings dated 9th May, 1978, itself and therefore his conduct in granting two months' time by the said proceedings was illegal. It does not necessarily follow that the respondent with be entitled to a fresh four months' time from 20th July, 1978. [*Paras. 6 and 7.*]

As to the contention that rule 163 (*b*) itself would not apply to the present case because the permit granted by the Authority was a national permit and there being no Central rule the grantee was not bound by the time-limit of 4 months as provided in rule 163 (*b*) a reading of sub-section (11) of section 63 of the Motor Vehicles Act will make it clear that it dislodges the provisions of section 63 (1) to the extent to which under that sub-section the validity of a permit granted by the Regional Transport Authority is confined to that region and the validity of a permit granted by the State Transport Authority is confined only to that State and provides that in respect of grant of the national permit, these barriers have been removed. Except to this extent, sub-section (11) does not displace all the other provisions of the Act or the rules applicable to the grant of permits by the authorities contemplated by the Act. Similarly, the rule contemplated by section 15 (*b*) (v) cannot have any reference to the period fixed for the production of the vehicle or the registration certificate as the case may be. [*Para.* 12.]

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice V. Ramaswami, dated 28th February, 1979 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 3909 of 1978 presented under Article 226 of the Constitution of India to issue a writ of *certiorarified, mandamus* calling for the records in K. Dis. 97116/B5/76 on the file of the State Transport Authority, Madras and after quashing the order dated 22nd September, 1978, directing the respondents herein to extend the time by one month time enabling the petitioner herein to produce the records such as registration certificate, fitness certificate and the tax paid for the vehicle to be produced for the issue of a National permit to the petitioner therein.

The Government Pleader, for Appellant.

T. Chengalvarayan, for Respondent.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the judgment and order of V. Ramaswami, J.,

dated 28th February, 1979, allowing W. P. No. 3309 of 1978.

2. Most of the facts are not in controversy. The respondent herein was the grantee of a National permit in the proceedings of the State Transport Authority, Madras, the appellant herein, dated 9th May, 1978. The proceedings communicated to the respondent herein stated that the grantee shall produce the registration certificate of the vehicle with valid fitness certificate and valid insurance certificate with current tax paid together with a remittance of Rs. 500 being the authorisation fee by way of crossed bank draft in favour of the appellant herein within two months from the date of the receipt of the order, which time could be extended specially for valid and adequate reasons on specific requests, failing which the sanction accorded was liable to be revoked. The said proceedings were received by the respondent herein on 13th May, 1978. The respondent remitted a sum of Rs. 500 being the authorisation fee referred to above, before 13th July, 1978, the two months' period referred to in the proceedings. However, he was not able to produce the vehicle within the two months' time. On 7th July, 1978, he applied to the appellant herein for extension of time and also stated that there was scarcity of Leyland lorries and that that was the reason why he was not able to produce the lorry. He also produced a letter from Messrs T. V. Sundaram Iyengar and Sons Ltd., stating that the respondent had placed an order for purchase of a lorry, that they could not comply with his request due to scarcity of vehicles and that they would be in a position to supply the same in the beginning of August, 1978. The appellant in his proceedings dated 20th July, 1978, acting under Rule 163 (*b*) of the Motor Vehicles Rules, 1940, granted time upto 12th September, 1978, with a rider that no further extension would be granted. The significance of the terminal date 12th September, 1978 is that since the original proceedings dated 9th May, 1978, were received by the respondent on 13th May, 1978, the four months' time which he would have had would expire by 12th September, 1978. The respondent herein on 11th September, 1978 filed another petition for extension of time for producing the vehicle, as he had to build up the body on the chassis purchased by him on 11th September, 1978. On 22nd September, 1978, the appellant rejected the said petition on the ground that he had no jurisdiction to extend the time under rule 163 (*b*) beyond the period of four months and that the said period of four months from 13th May, 1978, expired on 13th September, 1978. He accordingly revoked the sanction already granted. It is to quash the said order that the writ petition in question was filed by the respondent herein.

3. The learned Judge allowed the writ petition on the ground that rule 163 (*b*) of the Tamil Nadu Motor Vehicles Rules authorised the permit-granting authority to give time upto four months, that it did not contemplate the authority granting time for a period of less than four months, that only on 20th July, 1978, the appellant herein referred to rule 163 (*b*) of the Rules in his proceedings and in the original order dated 9th May, 1978, there was no reference to rule 163 (*b*) at all and that consequently it must be held that the time of two months granted by the proceedings dated 9th May, 1978, was only *ex gratia* and the statutory time-limit prescribed under rule 163 (*b*) commenced only from 20th July, 1978, when the appellant expressly referred to rule 163 (*b*). It is the correctness of this conclusion that is challenged in the present writ appeal filed by the State Transport Authority.

4. The matter to be considered in this appeal is the scope and effect of rule 163 (*b*) of the Tamil Nadu Motor Vehicles Rules, 1940 and whether the order of the learned Judge is correct with reference thereto.

5. Rule 163 (*a*) of the Rules states that no permit shall be issued until the registration mark of the vehicle to which it relates has been entered therein.

6. Rule 163 (*b*) consists of two paragraphs and the same after its amendments in 1978 and 1979 reads as follows :

"163 (*b*) when the applicant is unable to produce the certificate of registration on the date of his application for the permit, for the reason that he is not on that date in possession of a vehicle duly registered,

or for some other reason, the Transport Authority or the Tribunal, as the case may be, shall grant him four months' time to be, reckoned from the date of receipt of the orders passed by them on the application, to produce the certificate of registration of the vehicle before the Transport Authority which has to issue the permit in order that particulars of registration mark may be entered in the permit. In cases where the State Transport Authority's order is stayed by the State Transport Appellate Tribunal and is subsequently vacated, the time for production of the registration certificate should be calculated from the date of receipt of the order of State Transport Appellate Tribunal confirming the Transport Authority's order. If, however, the applicant acquired the vehicles and is able to produce the certificate of registration thereof within the four months' timea llowed under this rule, the Transport Authority concerned shall issue the permit in respect of that vehicle, provided that in cases where the orders of the Transport Authority or Tribunal for issue of permit are stayed by the High Court and the order of stay is vacated subsequently, the time for production of the records shall be calculated from the date of pronouncement of the order of the High Court vacating the stay.

The acquisition of a vehicle in pursuance of an order sanctioning the permit shall be at the sole risk of the applicant as the order sanctioning the permit may be reversed on appeal or revision under the Motor Vehicles Act and Rules and such acquisition shall not be deemed to be a point in favour of the applicant while disposing of the appeal or revision. If any applicant fails to produce the certificate or registration, together with current fitness certificate, within the four months' time, the Transport Authority, or the Tribunal, as the case may be, shall revoke its sanction :

Provided that in the case of permits for tourist vehicles, the time for production of certificate of registration of the vehicle shall be six months reckoned from the date of receipt of orders passed on the application to produce the certificate of registration of the vehicle before the Transport Authority".

It is true that rule 163 (*b*) merely uses the expression "four months' time" and it does not say whether the said four months' time should be given at a time or in aggregate on different occasions by way of extending the shorter time already granted Mr. T. Chengalvaroyan, learned counsel for the respondent, sought to support the conclusion of the learned Judge by pointing out that the rule merely talks of four months' time being granted at the first instance itself and that it does not refer to any aggregate period amounting to four months which alone will contemplate the grant of a shorter period than four months and the subsequent extension thereof once or more than once. We are unable to accept this argument. When rule 163 (*b*) refers to four months' time, it does not say whether that time should be granted at one instance or by way of subsequent extensions, the aggregate periods totalling to four months. In such a context, we are unable to agree with the learned Judge as well as the learned counsel for the respondent that simply because the appellan' on 9th May, 1978, gave only two monthst time, he was not exercising his powers under rule 163 (*b*) and that he was granting that time *ex gratia*. Further, it is well-settled that whenever a statutory authority exercises any power and performs any function, the said exercise and performance is relatable to the statutory provisions which confers the power and authorises the exercise of the function, even though the proceedings themselves do not mention the particular statutory provision. Consequently, no inference can be drawn from the fact that in the proceedings dated 9th May, 1978, no reference was made to rule 163 (*b*) and that such a reference was made only in the proceedings dated 20th July, 1978. Apart from that, we are unable to appreciate the finding of the learned Judge that there can be any *ex gratia* grant

of time by a statutory authority like the appellant herein.

7. Even assuming for the sake of arguments that under rule 163 (*b*) the appellant was bound to give four months' time by his proceedings dated 9th May, 1978, itself and therefore his conduct in granting two months' time by the said proceedings was illegal, it does not necessarily follow that the respondent will be entitled to a fresh four months' period from 20th July, 1978. However if according to the respondent, the action of the appellant on 9th May, 1978, granting two months' time was illegal and he was entitled to four months' time from the date of the receipt of the proceedings on 13th May, 1978, all that he can contend is that he had a right to claim a period of four months from 13th May, 1978, without being under an obligation to apply for extension of time on the expiry of two months. Even if that position is accepted, the appellant had not produced the vehicle and the registration certificate within the four months' time from 13th May, 1978, and therefore the respondent will not be entitled to any further extension of time and consequently the appellant had no alternative but to revoke the sanction.

8. Mr. Chengalvaroyan, learned counsel for the respondent, sought to argue that the provision for revocation of sanction occurs only in the last sentence of the second para. in rule 163 (*b*) and that therefore the rule must be taken to have contemplated the reckoning of the period of four months from the date of the disposal of the appeal by the Appellate Tribunal and not from the date of the receipt of the proceedings of the original authority, namely, the appellant herein. Having regard to the very detailed provisions in rule 163 (*b*) providing for all possible contingencies and in view of the categorical expression contained in the opening of rule 163 (b) that the said four months' time should be reckoned from the date of the receipt of the orders passed, we cannot accept the argument of the learned counsel for the respondent.

9. The learned counsel for the respondent then contended that rule 163 (*b*) itself did not apply to the present case, because the permit granted by the appellant in favour of the respondent was a national permit and with reference to such a national permit, section 63 (15) of the Motor Vehicles Act, 1939, contemplated the Central Government framing rules, that the Central Government have not framed any such rules and that therefore the appellant was not bound by any time-limit of four months, as provided in rule 163 (*b*). We are unable to accept this argument either. It is true that such a contention was put forward by the respondent in the affidavit filed in support of the writ petition; but the learned Judge, since he allowed the writ petition on another ground, did not go into the same. Consequently, we have to examine this contention.

10. Section 63 (1) of the Motor Vehicles Act states :

> "63 (1). Except as may be otherwise prescribed, a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region, and a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned".

There are two provisos to this section, which it is unnecessary to refer to for the purpose of this case. Sub-section (11) was introduced into this section by the amending Act XXVI of 1976. That sub-section reads as follows :

> "63 (11). Notwithstanding anything contained in sub-section (1), but, subject to the rules that may be made by the Central Government under sub-section (15), the appropriate authority may, for the purpose of encouraging long distance inter State Road Transport, grant to the public carriers in a State such number of national permits as the Central Government may specify in this behalf in relation to that State and the provisions of sections 54, 55, 56, 57, 58, 59, 59-A, 60, 61 and 64 shall, as far as may be, apply to or in relation to the grant of national permits :

Provided that the number of national permits specified for a State shall not be varied or modified except after consultation with the concerned State Government".

There is an *Explanation* to this sub-section which, among others, defined the expression 'national permit' as meaning a permit granted by the appropriate authority to a public carrier authorising him to operate as a public carrier throughout the territory of India or in such contiguous States, not being less than five in number (including the State in which the permit is issued), as may be specified in such permit in accordance with the choice indicated by the public carrier to whom such permit is granted.

11. The Central Act XXVII of 1977 amended the above provision by substituting the expression, "grant in a State, national permits to the owners of motor vehicles who use, or intend to use, such vehicles for the carriage of goods for hire or reward, in respect of such number of motor vehicles" for the expression "grant to public carriers in a State such number of national permits" occurring in sub-section (11) and by substituting the expressions "to the owner of a motor vehicle authorising him to operate as a public carrier" and "indicated by such owner" respectively for the expressions "to a public carrier authorising him to operate as a public carrier" and "indicated by the public carrier" occurring in the *Explanation* to sub-section (11).

12. Sub-section (15) of section 63, as introduced by Act XXVI of 1976 reads as follows:

"15 (*a*). The Central Government may make rules for carryiag out the provisions of sub-section (11).

(*b*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*i*) the authorisation fee payable for the issue of a national permit;

(*ii*) the fixation of the laden weight of the motor vehicle;

(*iii*) the distinguishing particulars or marks to be carried or exhibited in or on the motor vehicle;

(*iv*) the colour or colours in which the motor vehicle is to be painted;

(*v*) any matter, not specified in this Act. which shall be borne in mind by the appropriate authority in granting of national permit".

The contention of Mr. T. Chengalvaroyan is that sub-section (11) of section 63 has to be read with sub-section (15) (*b*) (v) of section 63 of the Act, and if so read, it will be clear that it is the Central Government which could make a rule prescribing the period within which the registration certificate and the vehicle should be produced and that the Central Government not having made any such rule, Rule 163 (*b*) as such has no application. We are unable to accept this argument. A reading of sub-section (11) of section 63 will make it clear that it dislodges the provisions of section 63 (1) to the extent to which under that sub section the validity of a permit granted by the Regional Transport Authority is confined to that region and the validity of a permit granted by the State Transport Authority is confined only to that State and provides that in respect of grant of a national permit, these barriers have been removed. Except to this extent, sub section (11) does not displace all the other provisions of the Act or the rules applicable to the grant of permits by the authorities contemplated by the Act. Similarly, the rule contemplated by sub-section (15) (*b*) (*u*) of section 63 cannot have any reference to the period fixed for the production of the vehicle or the registration certificate as the case may be. Hence we are of the opinion that the contention of the learned counsel for the respondent that it is only the rule that may be made by the Central Government under section 63 (15) (*b*) (*v*) that will govern the case of the respondent and not rule 163 (*b*), which is very general in terms, fails.

13. Under these circumstances, we allow the writ appeal, set aside the order of the learned Judge and dismiss the writ petition filed by the respondent herein. There will be no order as to costs.

14. It goes without saying that if the respondent herein, who had obtained a vehicle and who was ready to produce the same, though after the expiry of the period of four months from 13th May, 1978, applies for a permit, certainly the same will have to be considered taking into account the peculiar facts of his case and the fact that it was not the respondent who was responsible for not being able to produce the vehicle within the period of four months as contemplated by rule 163 (*b*) of the Rules.

R. S. —— *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Suryamurthy, J.*

The Tamil Nadu Wakf Board, by its Secretary having its office at No. 4, Santhome High Road, Madras-4 .... *Appellant**

v.

Dawood Bi ... *Respondent.*

Wakf Act (XXIX of 1954), sections 15 (2) (h), (i) *and* (o) *and 57 (3)—Scope and applicability.*

Section 15 (2) (*h*), (*i*) and (*o*) of the Wakf Act empowers the Wakf Board to take measures for the recovery of lost property of any wakf, institute and defend suits and proceedings in a Court of law relating to the wakf, and generally do all such acts as may be necessary for the due control, maintenance and administration of wakfs. This section applies to all wakfs and therefore the suit is maintainable whether the suit property belonged "F" Durga wakf or "J" Durga wakf. [*Para.* 7.]

The period of one month prescribed in subsection (3) of section 57 of the Act is applicable only to an application under section 57 (3). This is a summary remedy available to the Wakf Board. This summary remedy does not bar the plaintiff from instituting a suit for declaration of title and recovery of possession at any time before the title of the wakf to the property is extinguished by adverse possession and enjoyment by the party in possession. [*Para.* 9.]

Appeal against the decree of the Court of the Sudordinate Judge, Tiruchirapalli, dated 6th Novermber, 1976 and passed in Appeal Suit No. 196 of 1976, preferred against the the decree of the Court of the District Munsif, Tiruchirapalli, in Original Suit No. 1676 of 1973.

A. A. S. Mustafa, for Appellant.

S. Thiagarajan, for Respondent.

The Court delivered the following

JUDGMENT.—This is a second appeal against the learned Third Additional Subordinate Judge of Tiruchirapalli, allowing A. S. No. 196 of 1976 and reversing the judgment and decree of the learned Third Additional District Munsif, Tiruchirapalli in O. S. No. 1676 of 1973. The suit was instituted by the appellant (Tamil Nadu Wakf Board, by its Secretary) for a declaration of title and recovery of possession of an extent of 9' × 17' comprised in Door No. 26 situate in ward No. 4 Block No. 2 T. S. No. 44 in Tennur Village, Tiruchirapalli Taluk, on the allegation that the property belongs to the wakf known as Fathahulliah Saheb Dargah Wakf *alias* Zainullbideen Aulia Dargah, Tennur, Tiruchy, and was wrongfully alienated by the muthavalli.

2. The defendant contended that the property is not a wakf property and that the suit is barred by limitation.

3. The learned District Munsif decreed the suit with costs as prayed for. The learned Third Additional Subordinate Judge, Tiruchirapalli, however, came to the conclusion that the name of the Dargah mentioned in Exhibit B-1 in different from the name

*S. A. No. 1485 of 1977. 23*rd October,* 1980.

of the wakf mentioned in the plaint, that no document has been produced by the plaintiff to corroborate the evidence of P. W. 1 that the wakf to which the suit property belongs is known as Fathahullah Saheb Saheb Dargah Wakf *alias* Zainulabdeen Aulia Dargah, Tennur, Tiruchy, that the description of the property in the pro-forma Exhibit A-1 is different from the description of the suit property, that no doubt the sale certificate issued in favour of the defendant, viz., Exhibit B-1 proves that the property comprised in T. S. No. 44, viz., the suit property, belonged to Hazarath Jainulabdeen Aulia Dargah at Thennur, and that nevertheless that suit is liable to be dismissed because the suit property does not belong to the plaint mentioned wakf, though the plaintiff wakf Board has jurisdiction over the properties of the Dargah, evidently meaning of all Dargahs.

4. This appeal has been admitted on a question of law formulated thus: Whethe the dismissal of the suit by the first appellate Court is wrong on its own finding that the suit property is a wakf property?

5. This question of law has to be answered in favour of the appellant. It is seen from Exhibit B-1, the sale certificate issued in favour of the predecessor-in-title of the defendant, that O. S. No. 1004 of 1963 was filed against Hazarath Jainullabdin Aulia Dargah at Thennur by its hereditary trustee, the second defendant in that case, and Farzullakhan Samoji Sahib, son of Muzzaffar Hussain Khanpat Otha Gopuram Pallivasal High Road, Thennur, and a decree was obtained, and that in pursuance of the decree, E. P. No. 1326 of 1964 was filed and after obtaining the permission of the Court, the property was purchased by the decree-holder himself. This property in T. S. No. 44 is the subject matter of the suit. In the pro forma, Exhibit A-1, this very same Farzullah Khan Samoji, son of Mussaffar Hussain Samoji is mentioned as the muthavalli of Sha Farzullah Sha Khaddari Mosque-Wakf. This is the wakf mentioned in the plaint as Fathahullah Saheb Dargah Wakr *alias* Zainulabdeen Aulia Dargah. It matters not whether the property belongs to Fatahullah Sahed Dargah Wakf or Zainullabdeen Aulia Dargah, because the plaintiff has instituted the suit on behalf of both, though equating the one with the other. Even assuming that they are two different Dargahs, the suit is maintainable, because it is alleged in the plaint that the property belongs to Zainulabdeem Aulia Darga.

6. The learned counsel for the respondent put forward a very startling contention that Zainulabdeen Aulia Dargah is different from Hazarath Jainulabdin Aulia Dargah referred to in Exhibit B-1. Hazarath is a term of reverence prefixed to the proper name and, therefore there is no doubt about the fact that Hazarath Jainulbdeen Aulia Dargah at Thennur is the same as Zainulabdeen Aulia Dargah at Thennur. The learned Subordinate Judge also has fallen into the same error of thinking that the name of the Dargah mentioned in Exhibit B.-1, *viz.*, Hazarath Jainulabdin Aalia Durgah mentioned in Exhibit B.-1, *viz.*, Hazarath Zainulalbdin Aulia Dargah at Thennur is different from the name of the wakf mentioned in the plaint, *viz.*, Zainulabdeen Aulia Dargah Tennur, Tiruchy.

7. Section 15 (2) (*h*) and (*o*) of the Wakf Act empowers the Wakf Board to take measures for the recovery of lost properties of any wakf, to institute and defend suits and proceeding in a Court of law relating to wakfs, and generally do all such acts as may be necessary for the due control, maintenance and administration of wakfs. This section applies to all wakfs, and, therefore, the suit is maintainable whether the property belongs to Fathahullah Saheb Dargah Wakf or Zainulabdeen Aulia Dargah.

8. The defendants had contended that the suit is barred by limitation. This contention is preposterous because the defendant's predecessor-in-title had taken possession of the suit property only in pursuance of Exhibit B.-1 dated 17th October, 1976, and this suit has been instituted within twelve years from the date of Exhibit B.-1.

9. The learned counsel for the respondent contends that by reason of section 57 (3) of the Wakfs Act, the suit is barred. Section 57 read as follows :

"(1) In every suit or proceedings relating to a title to wakf property or the right of

a mutawalli, the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any wakf property is notified for sale in execution of a decree of a civil Court, or for the recovery of any revenue, cess, rates, or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf."

The period of one month prescribed in sub-section (3) of section 57 of the Act is applicable only to an application under section 57 (3). This summary remedy does not bar the plaintiff from instituting a suit for declaration of title and recovery of possession at any time before the title of the wakf to the property is extinguished by adverse possession and enjoyment by the party in possession. Therefore, there is no substance in the contention of the defendant that the suit is barred by limitation.

10. Hence, this second appeal is allowed, the judgment and decree of the learned Subordinate Judge in A. S. No. 196 of 1976 are set aside, and the judgment and decree of the learned District Munsif in O. S. No. 1676 of 1973 are restored, and the suit is decreed as prayed for with costs throughout

R. S. — *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, CJ* and *V. Ratnam, J.*

Kuppuraj ... *Appellant**

v.

K. Arjunan and others ... *Respondents.*

Limitation Act (XXXVI of 1963), Article 67 — Applicability — Suit for partition — No plea that suit should have been filed as one for recovery of possession — Landlord and tenant — Tenant claiming title by adverse possession — Non-payment of rent regularly not enabling tenant to claim title by prescription.

To a suit for partition valued under section 37 of the Court fees Act, 1955 for the purpose of court-fee and jurisdiction Article 67 of the Limitation Act has no application [*Para.* 5]

A tenant cannot claim title to the demised property by adverse possession, unless he surrenders possession of the property to the landlord. Mere failure on the part of the tenant to pay rent regularly to the landlord cannot clothe him with a right to claim title by prescription. After all, a claim of title by prescription is one of animus, and there must have been some overt act on the part of the tenant that he intends to claim title in himself hostile to the title of the lessor. [*Para.* 6].

Appeal under clause 15 of the Letters Patent against the Judgment and decree dated 21st 21st November, 1975 of Mr. Justice Sethuraman and made in S. A No. 136 of 1973 preferred to the High Court against the Judgment and decree dated 31st October, 1972 of the Court of the Subordinate Judge, Coimbatore and made in A. S. No. 115 of 1972. (O. S. No. 1190 of 1969 Additional District Munsiff Court, Coimbatore).

K. Sarvabhauman and *T. R. Mani,* for Appellant.

D. Raju and *M. Venkatachalapathi,* for Respondents.

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*L. P. A. No. 119 of 1976. *16th April,* 1980.

The Judgment of the Court was delivered by

Ismail, C J.,—This is an appeal, against the Judgment and decree of Sethuraman, J., dated 21st November, 1975, rendered in S. A No. 136 of 1973. The suit property admittedly belonged to one Muthayya Udayar, who had two sons, by name, Ramaswami and Marudachalam. Ramaswami died long ago and his son Mariappan, the first defendant in the suit, and Marudachalam entered into a partition on 10th May, 1939, under which each of them got a half share in the suit property. The half share of the property allotted to Marudachalam was alleged to have been leased in favour of the first defendant under Exhibit A-2 dated 10th May, 1939, *i. e.*, the same day as the date of the partition. On 9th April, 1969, the first defendant sold, not only his half share in the suit property, but also, the other half share of Marudachalam, for a consideration of Rs. 7,200 in favour of the second defendant. The plaintiff and the third defendant are the sons of Marudachalam. The plaintiff filed the present suit for partition and separate possession of 1/4 share in the suit property, *viz.*, a half share in Marudachala's share of the suit property, the other half going to the third defendant, on the ground that the first defendant had no right to alienate the property belonging to Marudachalam.

2. A written statement was filed only by the second defendant, the first defendant and the third defendant not contesting the suit. According to the second defendant, Marudachalam had, during his life time, sold his half share of the suit property to the first defendant for a sum of Rs. 75, that the first defendant had thus become the absolute owner of the entire property and therefore the first defendant was entitled to execute the conveyance validly in favour of the second defendant. The second defendant also put forward a plea that the suit was barred by limitation.

3. On the basis of these pleadings the trial Court first framed issues and then recast them as follows :-

1. Whether the deed of lease dated 10th May, 1939, is true, valid and admissible in evidence,

2. Whether the oral sale pleaded by the second defendant is true ?

3. Whether the sale in favour of the second defendant dated 9th April, 1969 is true, valid and binding on the plaintiff ?

4. Whether the suit is in time ?

5. Whether the second defendant has perfected title by adverse possession ?

6. To what relief is the plaintiff entitled ?

The trial Court by its judgment and decree dated 22nd February, 1971, held that Exhibit A-2 being unregistered was not admissible in evidence, and that the second defendant had not proved that he had perfected title by adverse possession, and consequently decreed the suit for partition and separate possession of the plaintiff's $\frac{1}{4}$ share. The appeal preferred by the second defendant to the Court of the Subordinate Judge of Coimbatore was dismissed. It was thereafter that the second defendant preferred the second appeal to this Court, referred to above. The learned Judge in his judgment points out :

> "The only point urged by him (learned counsel for the second defendant) in his appeal was that the present suit was barred by limitation under Article 67 of the Limitation Act."

The learned Judge held that Exhibit A-2, though unregistered could be looked into for a collateral purpose, namely, as to when the lease determined, that in this case the lease determined on 10th May, 1940, that consequently under Article 67 of the schedule to the Limitation Act of 1963, the suit should have been instituted by May, 1952, and that therefore the suit having been actually instituted in 1969 was barred by limitation. Hence the learned Judge dismissed the suit instituted by the plaintiff, on this sole ground, namely, bar of limitation under Article 67 of the schedule to the Limitation Act. It is the correctness of this conclusion that is challenged in the present Letters Patent appeal, with the leave of the learned Judge.

4. We are clearly of the opinion that the conclusion of the learned Judge is erroneous. Article 67 of the schedule to the Limitation Act of 1963 reads as follows :

Description of Suit.	*Period of Limitation*	*Time from which period begins to run.*
67. By a landlord to recover possession from a tenant.	Twelve years.	When the tenancy is determined.

Consequently the said article can apply only when the landlord files a suit for recovery of possession of the property from the tenant. As we pointed out already, the present is not a suit by a landlord for recovery of possession of the property from the tenant, but is one for partition and separate possession of the plaintiff's 1/4 share. As a matter of fact, the suit has been valued under section 37 (1) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. It is not even the case of the second defendant that the suit filed as one for partition was not maintainable and that the suit should have been filed as one for recovery of possession and relevant Court-fee should have been paid. Under these circumstances, the suit being one for partition valued under section 37 of the Court-fees Act, 1955, for the purpose of Court-fee and jurisdiction, Article 67 of the schedule to the Limitation Act of 1963, referred to above, can have no application. Consequently the learned Judge is in error.

6. Even apart from this, we have to consider the question whether the suit can be said to be barred by limitation. As we pointed out already, the only ground urged by the second defendant was that the first defendant was a lessee of the suit property from Marudachalam, that the lease commenced in 1939, that the lease determined in 1940, that the tenant had not paid any rent and that neither Marudachalam nor the plaintiff nor the third defendant collected any rent. We are of the opinion that the tenant cannot claim title to the demised property by adverse possession, unless he surrenders possession of the property to the landlord. Mere failure on the part of the tenant to pay rent regularly to the landlord cannot clothe him with a right to claim title by prescription. After all, a claim of title by prescription is one of animus, and there must have been some overt act on the part of the tenant that he intends to claim title in himself hostile to the title of the lessor. No such case has been put forward or proved in this case, and, therefore, even independently of Article 67 of the schedule to the Limitation Act, 1963, adverse possession cannot be said to have been established in the present case. On this ground also the suit instituted by the plaintiff cannot be dismissed.

6. Consequently the appeal is allowed, the judgment and decree of Sethuraman, J., dated 21st November, 1975, in S. A. No. 136 of 1973 are set aside, and the said second appeal will stand dismissed. There will be no order as to costs.

S. J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT;—*M. M. Ismail C J., and R. Sengottuvelan, J.*

Vedapatasala Trust, Sooramangalam, by Trustee S. Guruswami Iyer and others

... *Petitioners**

v.

The State of Tamil Nadu represented by the Collector of Thanjavur and others

... *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 2 (1) (ii) — Trusts created for running Vedapatasala — Religious trust of public nature —Provisions of the Act will not apply.

A common question was raised in these Civil Revision Petitions, namely, whether the public trusts involved in running a Vedapatasala would come within the scope of section 2 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. The imparting of instructions in Vedas and Agamas is certainly of a religious nature. Therefore, whenever a trust which is of a public nature provides for the imparting of instructions in Vedas and Agamas, certainly, that will be a religious trust of a public nature and imparting of instructions in Vedas and Agamas cannot be anything other than of religious nature. The trusts in all these cases will constitute religious trust of a public, nature, because the trusts are running Veda Patasalas for imparting instructions in Vedas ahd Agamas. [*Para.* 8.]

Sub-section (3) of section 2 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, clearly points out that where a public trust has been created both for a public purpose of a religious nature and for any other public purpose or the income from a public trust in existence on the date of the commencement of the Act is appropriated both for public purpose of a religious nature as also for any other public purpose, such public trust shall be deemed to be a religious trust of a public nature. Consequently with regard to all these trusts on the basis of section 2 (1)(*ii*) read with section 2 (3) of the Act, the provisions contained in the Act will not apply. [*Para.* 9.]

Cases referred to :—

Muthuswami v. *Muthian*, (1975) T. L. N. J. 321 ; *Annamalai Chettiar* v. *Solaiyappa Chettiar*, (1935) 69 M. L. J. 274 : 42 L. W. 505: A. I. R. 1935 Mad. 983; *A. K. Vavalleevvai Maricair* v. *The State of Tamil Nadu*, (1979) 2 M. L. J. 121 : 92 L. W. 261.

Petitions under section 83 of the Tamil Nadu Act LVIII of 1961 as amended by Act XXXVII of 1972, praying the High Court to revise the orders of the (1) land Tribunal (Sub Court) Nagapattinam dated 6th October, 1975 in C. M A. (L. T.) No. 3 of 1975 (Master Register I Case No. 26 I/ Trust — TRP Authorised Officer (Land Reforms) Nagapattinam in C. R. P. No. 1012 of 1976)

2. Land Tribunal (Sub Court) Nagapattinam dated 27th March, 1976 in C. M. A (L.T.A.) No. 6 of 1976 (M.R.I. 11p/ Trust A.3, Authorised Officer (Land Reforms) Nagapattinam (In C. R. P. No. 1453 of 1976).

3. Land Tribunal (Sub Court) Kumbakonam dated 7th November, 1978 in C.M. A. No. 23 of 1978 (M.R.I.1 (R) /Trust /KBK Additional Authorised Officer (Land Reforms) Thanjavur (In C.R.P. No. 146 of 1979).

4. Land Tribunal (SubCourt) Kumbakonam dated 7th November, 1978 and passed in C.M.A. No. 82 of 1977 (M.R. I. 12k/ Trust/ KBK/ Additional Authorised Officer (Land Reforms) Thanjavur (In C. R. P. No. 532/790 and

5. Land Tribunal (Sub Court) Kumbakonam dated 15th December, 1978 in C. M A. No. 8 of 1978 (M. R. I. 2/I/ Trust /KBK/ Addl.

*C. R. P. Nos. 1012 and 1453 of 1976 and 146, 532 and 804 of 1979.

12th November, 1980.

uthorised Officer (Land Reforms) Thanjavur Mannargudi) (in C. R. P. No. 804 of 1979) respectively.

The C. R. P. No. 1012 of 1976, having been posted for hearing before Mr. Justice Ratnavel Pandian on Tuesday 24th April, 1979 (in his Lordships Chamber) and upon hearing the arguments of

T. R. Ramachandran, for *T. R. Rajagopalan* and *T. R. Rajaraman*, for Petitioner.

The Government Pleader on behalf of Respondent.

The Court made the following

ORDER :— The revision - petitioner by this revision challenges the order passed in C. M. A. (L. T.) No. 3 of 1975 on the file of the Land Tribunal at Nagapattinam mainly raising the contention that a Vedapatasala is a public religious trust as defined in Tamil Nadu Act No. LVIII of 1961 as amended by Act. No. XXXVII of 1972 and hence the provisions of the said Act are not applicable to a Vedapatasala. The learned Government Pleader resists the above contention placing reliance on the decision of this Court in *Muthuswami* v. *Muthiah*[1] rendered by a Division Bench of this Court consisting of Veeraswami C J. and Natarajan, J., holding that a Vedapatasala is not a public religious institution while examining the provisions of Tamil Nadu Act XXVI of 1963.

2. Mr. T. R. Ramachandran appearing for the petitioner, submits that the attention of the said Division Bench was not drawn to a decision rendered by Venkatasubba Rao, J. in *Annamalai Chettiar and others* v. *Solaiyappa Chettiar and another*[2] wherein the learned Judge while examining the question whether a Vedapatasala is a public religious trust or not, has made the following observations :

> "That if the object of the trust were the renovation of the temple and nothing more, then the trust would in that event be a religious endowment under the local Act, can admit of no doubt, for the renovating of a temple would clearly be the performance of a charity in connection with that temple. But what is the effect of combining with that purpose, the maintaining of a Vedapatasala which it must be observed, is not connected with any temple? Under the Act, it is of the essence of a religious endowment that it should be so connected and as this requisite is wanting the fund to the extent to which it is devoted to this purpose, cannot be held to be a religious endowment. Although it is not a religious endowment under the Act, the object is nevertheless not temporal or secular in character as the plaintiff contends, but is of religious nature under section 92, Civil Procedure Code. The object of maintaining a Vedapatasala is not to promote knowledge in general but spiritual knowledge; in other words, its purpose is the advancement of religion. Under the English decisions gifts for the maintenance of institutions, such as the society for the propagation of the gospel or the promotion of Christion knowledge are gifts for religious purposes and hence are charitable for all religious trusts are in a sense charitable although the converse of this proposition does not hold good. A Vedapatasala is akin to the institutions mentioned above as its purpose is the promoting of the knowledge of the Vedas".

In view of the importance of the question involved in this revision petition, I consider that it would be better if the matter is heard by a Bench so that an authoritative pronouncement can be got. Incidentaly I may point out that a number of revision petitions raising the same question are admitted and pending.

3. Accordingly the papers shall be placed before my Lord the Chief Justice for posting this matter before a Bench.

T. R. Ramachandran for *T. R. Rajagopalan*, and *T. R. Rajaraman*, for Petitioner (in C.R.P. No. 10 of 1976).

R. G. Rajan for Petitioner (In C.R.P No. 1435 of 1976.)

1. (1975) T. L. N. J. 321.
2. (1935) 69 M. L. J. 274 : 42 L. W. 505 : A. I. R. 1935 Mad. 938.

B. Rajagopalan for, Petitioner (In C.R. P. Nos. 146, 532 804 of 1979.)

Advocate General for Respondent.

The Order of the Court was made by

Ismail, CJ.—One of these cases has been referred to a Bench by Ratnavel Pandian, J–.

6. All these Civil Revision Petitions filed under section 83 of the Tamil Nadu Act LVIII of 1961 read with section 115 of the Code of Civil Procedure raise a common question namely, whether the public trusts involved in these Civil Revision Petitions running the Vedapatasalas would come within the scope of section 2 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Tamil Nadu Act LVIII of 1961 hereinafter referred to as the Act. Before we refer to the relevant statutory provisions, we shall refer to the findings of the Authorised Officer (Land Reforms) and the Land Tribunal on appeal. In C. R. P. No. 101 of 1976 the Tribunal has found as a fact that the trust in question was conducting Vedapatasala and the trust itself was known as Vedapatasala trust Sooramangalam. We shall refer to the findings in C. R. P. No. 1453 of 1976 after referring to the facts in the other three cases. In C. R. P. No. 146 of 1979 admittedly the trust is functioning under a scheme and the trust is conducting a Vedapatasala to impart Vedas, Agamas and allied subjects among others. In C. R. P. No. 532 of 1979, again the trust in governed by a scheme decree passed by the Sub Court, Kumbakonam in O. S. No. 90 of 1916 and under the scheme decree, a Yajurveda Patasala was being maintained. In C. R. P. No. 804 of 1979. the trust itself was called as Doraisami Iyer Meenakshi Ammal Vedapatasala Dharmam and it provides for the Establishment and maintenance of Vedapatasalai. There is no dispute in these four Civil Revision Petitions of the fact that a Vedapatasalai is being run by the respective trusts in question. We shall now take up the facts in C. R. P. No. 1453 of 1976. The trust in this case is called as Perugavazhndan (Sri Annapoorni Amman and Anna Chatram) in Mannargudi taluk and the trust was said to consist of the performance of poojas to the idols of Annapoorni Amman, Ummamaheswarar, Maha Ganapathi, Maha Vishnu and Salagramam in the Chatram besides the running of the Vedapatasala and the feeding of four Desanthries daily. The Authorised Officer refers to the evidence of P. Ws. 1 to 3 who spoke to the performance of these functions in the Chatram and observes:

> "This trust is stated to have been founded in the year 1846 but the original trust deed has not been produced as it is said to be not available. Exhibits P-8 and P-9 are only partition deeds relating to the family. In these documents there is no mention about the performance of charities as elicited from P. Ws. 1 to 3. Even granting that daily poojas etc., are conducted in the chatram as stated by P. Ws. 1 to 3, it is only for the benefit of the family of the founder of the trust. P. W. 1 has admitted that the public generally do not visit the chatram. So the poojas said to be conducted cannot constitute as one of public religious nature. Similarly running of a Vedapatasala is not a religious nature as recently held by the Madras High Court; poor feedings said to be done in the chatram is only a public charity. On a perusal of the available materials placed before me I find that the trust Perugavalndhan Anna Chatram is only a public trust of charitable nature as defined in clause 36 (AAA) under section 3 of the amended Act XXXVII of 1972."

When the matter was taken up in appeal before the Land Tribunal it also referred to the evidence of P. Ws. 1 to 3 and held that the trust was not a religious trust of a public nature and, therefore, it was not exempted from the purview of the Act LVIII of 1961 as amended by Act XXXVII of 1961 as amended by Act XXXVII of 1972. It refers to the evidence of P. Ws. 1 to 3 with regard to the Vedapatasala and was of the opinion that:-

> "When even a Vedapatasalai situated in a temple cannot be considered as a religious institution the Vedapatasalai said to have been in existence in the chatram cannot be considered as a religious institution so as to exempt the trust in question from the purview of Act LVIII of 1961".

We are giving these extracts from the orders of the Authorised Officer as well as

the Land Tribunal only for the purpose of showing that they have not recorded a definite finding that the trust was not running a Vedapatasala.

7. It is against the background of these facts, we shall now refer to the statutory provisions in this behalf. The Act itself was one to provide for the fixation of ceiling on agricultural land holdings and for certain other matters connected therewith in the State of Tamil Nadu. Section 3 is the definition section. The definitions that are relevant for the purpose of the present case are those that are contained in clause 36-A, clause 36-AAA and clause 36-B as including a trust under which the beneficiaries are persons who are ascertained or capable of being ascertained" Clause 36-AAA defines public trust as meaning a trust for a public purpose of a religious, charitable or an educational nature. Clause 36-B defines religious institution as meaning any "(1) Temple (*ii*) Math ; (*iii*) Mosque ; or (*iv*) Church ; which is dedicated to, or for the benefit of, or used as of right by, the public as a place of religious worship". Section 2 of the Act is as follows:—

2. Act not apply to lands held by existing religious institution or religious trust of public nature :-

(1) Subject to the provisions of sub-sections (2) and (3) and of section 6, nothing contained in this Act shall apply to lands held :-

(*i*) by any religious institution or (*ii*) by any religious trust of a public nature which is in existence on the date of the commencement of this Act.

(2) Nowithstanding anything contained in sub-section (1) no such religious institution or religious trust of public nature as is referred to in sub-section (1) shall acquire by any means whatsoever any land after the date of the commencement of this Act.

(3) Notwithstanding anything contained in this Act, for purpose of this section : (*a*) Where a public trust in existence on the date of the commencement of this Act, has been created both for a public purpose of a religious nature and for any other public purpose; or

(*b*) Where the income from a public trust in existence on the date of the commencement of this Act is appropriated both for a public purpose of a religious nature and for any other public purpose, such public trust shall be deemed to be a religious trust of a public nature".

Admittedly none of these trusts will constitute a religious institution so as to come within the scope of section 2 (1) (*i*) of the Act read with section 3 (36-B) of the Act. Consequently the only other question that is required to be considered is whether these trusts will fall within the scope of section 2 (1) (*ii*) of the Act. As we pointed out already there is no dispute about the fact that these trusts are of a public nature. The only other question is whether they can be considered to be religious trusts of a public nature or not. A trust created for the running of a Vedapatasala is certainly a religious trust and there can be no controversy about it. As a matter fact that was not controverted even by the learned Advocate General. However what the Tribunal has done in these cases is to rely upon an unreported judgment of a Bench of this Court in *Kuthuchami and others* v. *RM. M. V. Muthiah Chettiar and others*[1]. We are clearly of the opinion that that judgment has no relevancy whatever to the present controversy and therefore the Land Tribunal erred in relying upon the judgment for the purpose of holding that the trusts in the present cases will not fall within the scope of section 2 (1) (*ii*) of the Act. That judgment arose out of certain proceeding for the grant of a ryotwari patta under Tamil Nadu Act XXVI of 1963 namely the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1963. Section 9 of that Act deals with the grant of a ryotwari patta to landholders. One of the requirements provided for in proviso to section 9 (1) (*a*) was that the private land should be proved to have been cultivated by the landholder himself by his own servants or by hired labour, with his own or

1. S. T. A. No. 2 of 1973, dated 16th September, 1975.

hired stock in the ordinary course of husbandry for a continuous period of three years within a period of twelve years immediately before the 1st day of April, 1960 Such a proviso with an explanation finds a place in sub-section (2) also. However this requirement as to personal cultivation was modified by Tamil Nadu Act XXVII of 1966. This Act substituted for the words "is proved to have been cultivated by the landholder himself" the words "is in the case of a landholder other than a religious institution was exempted from the requirement of personal cultivation". An explanation was added which stated that the expression religious institution shall mean a religious institution as defined in clause (18) of section 6 of the Tamil Nadu Hindu Religious and Charitable Endowments Act 1959 (Tamil Nadu Act XXII of 1959). Section 6 (18) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, defines the expression 'religious institution' as meaning "a math, temple or specified endowment". Section 6 (19) of this Act defines the expression "Specific endowment" as meaning "any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity, but does not include an inam of the nature described in *Explanation* (1) to clause (17) "It is these provisions of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 as amended by Tamil Nadu Act XXVII of 1966 that came to be considered by the Bench in the unreported decision referred to above. The Bench observed:

> "The Tribunal was of the view that the Yajur Veda Patasalai was a religious institution which would imply that for purposes of Madras Act XXVI of 1963 the trustees would not be called upon to prove personal cultivation in order to entitle them to treat the land as private and therefore apply for ryotwari patta. It is rather surprising that the Tribunal should have made short work of this question as to the character of the Yajur Veda Patasalai. It merely referred to the definition of specific endowment, religious charity and a mutt under the Hindu Religious and Charitable Endowments Act and the immediately concluded that because the Patasalai was teaching Yajur Veda in the Perumal and Siva Temples at Tirumayyam, it automatically followed that it was a religious institution. We are unable to agree with this view. A religious institution is one in which worship is done to an idol or some religious service is done to an idol or in connection with a festival in a temple. Likewise a kattalai or a specific endowment is considered to be a religious charity because the character of the service is religious. Teaching Yajur Veda by itself will not be of a religious character and convert the institution into a religious institution. The location of the Patasalai in the temple premises will make no difference any more than if an ordinary school imparting secular instruction were situate therein. It would not be called a religious institution for that reason. What decides the character of the institution as religious is that the institution by itself must be of a religious character. In other words, either worship should be conducted there, or in connection with the Idol or a festival in the temple some service of a religious character should be conducted. This is not of that type. There is no comparison between a mutt and Yajur Veda Patasalai. The Mutt itself is a religious institution because it is engaged in the propagation of religion and a particular form of worship. We are of the view therefore that the Yujur Veda Patasalai run in Perumal and Siva Temples at Tirumayyam cannot be regarded as a religious institution and therefore if the institution claims a land to be pannai, it is necessary for it to prove also personal cultivation as required by the provisions of Madras Act XXXVI of 1963."

Thus it will be seen that the Bench was dealing with a religious institution for the purpose of Tamil Nadu Act XXVI of 1963 which as we pointed out already was based upon the definition of religious institution' contained in section 18 of the Tamil Nadu Act XXII of 1959.

8. However as far as the present cases are concerned there is a definition of religious institution 'in section 3 (36-B) of the Act and therefore for the purpose of section

(1) (*i*) it is that definition that will apply as far as section 2 (1) (*ii*) is concerned. The Act itself has not defined what is a religious trust of a public nature. Consequently, we have to construe the provision according to its ordinary meaning and its natural tenor. The imparting of instructions in Vedas and Agamas is certainly of religious nature. Therefore, whenever a trust which is of a public nature provides for the imparting of instructions in Vedas and Agamas, certainly that will be religious trust of a public nature and the imparting of instructions in Vedas and Agamas cannot be anything other than of religious nature.

It is relevant in this context to refer to the observations of Venkatasubba Rao., J. in *M. Ar. Rm. M. Annamalai Chettiar and Others* v. *Al. A. C. T. Solaiyappa Chettiar and another*[1]. In the case also the learned Judge was considering the nature of the trust fund. The learned Judge observed :

> "Although it is not a religious endowment under the Act, the object is nevertheless not temporal or secular in character as the plaintiffs contend, but is of a religious nature under section 92, Civil Procedure Code. The object of maintaining a Veda Patasala is not to promote knowledge in in general but spiritual knowledge; in other words, its purpose is the advancement of religion. Under the English decisions, gifts for the maintenance of institutions such as the society for the propagation of the Gospel, or the promotion of Christian knowledge are gifts for religious purposes and hence are charitable; for all religious trusts are in a sense charitable, although the converse of this proposition does not hold good. A Veda patasala is akin to the Institutions mentioned above as its purpose is the promoting of the knowledge of the Vedas."

Under these circumstances, we are clearly of the opinion that the trusts in all these cases will constitute religious trusts of a public nature, because the trusts are running Veda Patasalas for imparting instructions in Vedas and Agamas.

9. In some of these cases, the trusts in addition to running of Vedapatasalas, conduct certain other charities also. In C. R. P. No. 1453 of 1976, we have already referred to the claim of the performance of poojas to certain idols in the Chatram as well as the feeding of four Desanthries every day. Similarly in C. R. P. No. 532 of 1979 in addition to the imparting of instructions in Yajur Veda there is provision for teaching Sanskrit and feeding Brahmin boys. In C. R. P. No. 804 of 1979 in addition to the running of Vedapatasala with a hostel attached there is provision for maintaining a Thanneerpandal. Sub-section (3) of section 2 which was already extracted clearly points out that where a public trust has been created both for a public purpose of a religious nature and for any other public purpose or the income from a public trust in existence on the date of the commencement of the Act is appropriated both for a public purpose of religious nature and for any other public purpose, such public trust shall be deemed to be a religious trust of a public nature. Consequently with regard to all these trusts on the basis of section 2 (1) (*ii*) read with section 2 (3) of the Act the provisions contained in the Act will not apply.

10. In this connection, we may refer to a Judgment of Ramanujam, J. in *A. K. Vavalleevvai Maricair Dharmam, Nagore* v. *The State of Tamil Nadu represented by the Collector of Thanjavur*[1] in which a question of this nature directly arose. In that case also, the Authorised Officer after considering the recitals in the trust deed and the oral evidence held that the trust in question was not entitled to be declared as a religious trust of a public nature and the trust created under the deed was only of a charitable nature and therefore the trust was not entitled to claim exemption in relation to the lands held by it under section 2 of the Act. There was an appeal to the Tribunal by the Managing trustee. The appeal having failed, the trustees came before this

1. (1935) 69 M. L. J. 274 : A. I. R. 1935 Mad. 983.

1. (1979) 2 M. L. J. 121: (1979) 92 L. W. 261.

Court by way of Civil Revision Petition. The learned Judge referred to the actual provisions contained in the trust deed which were as follows :

After extracting the above portion, the learned Judge observed :—

> "This indicates that religious instructions and lessons on Islamic religion are given in the Madarasa for the benefit of Muslim girls and boys. The question is whether the running of such Madarasa will be taken to be religious object or it is merely a charitable object".

The learned Judge further observed:

> "The trust deed does not merely direct the giving of general education to the Muslim boys and girls but it specifically refers to religious instruction to be given and also the teaching of Koran to the boys and girls. That means, the Madarasa is intended to give only religious instructions to Muslim boys and girls and not the general education. If it is merely a general education that is imparted in the Madarasa then it will be charitable but as the main object of the Madarasa is to a give religious instructions to Muslim boys and girls, it can only, be treated as pertaining to religion".

Before the learned Judge also reliance was placed on the unreported Bench judgment of this Court to which we have drawn attention. The learned Judge distinguished that judgment by pointing out :

> "The Division Bench took the view that teaching of Yajur Veda by itself will not be a religious object so as to convert the endowment into a religious institution as it is one in which worship is done to an idol or some service is done to an idol or in connection with a festival in a temple and that the location of the Veda Patasala in the temple premises will make no difference any more than if an ordinary school imparting secular instruction were situate therein. I do not see how the principle laid down in that case will apply to the facts of the case be foreus. In the above case, the patasala was started only for teaching Yajur Veda and the Court held that teaching of Yajur Veda by itself cannot be said to be a religious object since the teaching of Yajur Veda is not connected with any religious object. In this case however, the object of running a Madarasa for which the trust was created is to impart instruction in Islamic religion and to teach Koran to the Muslim boys and girls. Therefore the entire object of the trust was to give religious instructions to Muslim boys and girls that is to spread religious tenets, and therefore the trust is only of religious nature".

Though we agree with the conclusion of the learned Judge that the trust in that case was a religious trust of a public nature and therefore entitled to exemption under section 2 (1) (*ii*) of the Act and that the decision in the unreported Bench judgment does not apply to sueh a case we rest our conclusion for distinguishing the unreported Bench judgment on the reasons we have already given, having regard to the statutory provisions contained in Tamil Nadu Act XXVI of 1963 as amended by Act XXVII of 1966 importing the definition of religious institution contained in section 6 (18) of the Tamil Nadu Act XXII of 1959.

11. Hence we allow C. R. P. Nos. 1012 of 1976 and 146, 532 and 804 of 1979 and set aside the orders of the Authorised Officer as well as the Land Tribunal and hold that the trusts in question fall within the scope of section 2(1)(*ii*) read with Section 2(3) of the Act.

12. As far as C. R. P. No. 1453 of 1976 is concerned, as we pointed out already there is no definite finding either by the Authorised Officer or by the Land Tribunal holding that there was no Vedapatasala being run. In view of this we allow this C. R. P. also and set aside the order of the Land Tribunal and remit the matter to the Land Tribunal to render a specific finding on the question and decide the matter in the light of this judgment.

13. There will be no order as to costs in any of these Civil Revision Petitions.

R. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *S. Natarajan and V. Sethuraman, J J.*

L. R. M. L. L. Lakshmanan Chettiar .... *Appellant**

v.

V. AR. Alagappa Chettiar and others .... *Respondents.*

Limitation Act (XXXVI of 1963), sections 18 and 19—Acknowledgment of liability—Scope and applicability—Difference between the two sections.

Section 18 of the Limitation Act deals with the making of an acknowledgment of a liability before the expiration of the period prescribed for a suit or application in respect of a property or right. Section 19 deals with payment on account of a debt or of interest on a legacy being made before the expiration of the prescribed period of limitation by the person liable to pay the debt or legacy or by his agent duly authorised in that behalf, and a fresh period of limitation being computed from the time when the payment was made. The difference between the two sections has been succinctly set out in *Parameswaran* v. *Purushothaman and Company*, (1977) K.L.T. 696: A. I. R. 1977 Ker. 132. [*Para.* 11.]

Thus while under section 18 there should be an acknowledgment of liability, under section 19 an endorsement of payment need not imply on acknowledgment of liability. The mere fact of payment as evidenced by the endorsement will have the effect of extending the period of limitation. [*Para.* 11.]

Cases referred to :—

Parameswaran v. *Purushotham & Co.*, (1977) K. L. T. 696 : A. I R. 1977 Ker. 132; *Veeraraghavayya* v. *Seetharamayya*, (1943) 2 M. L. J. 456 : 56 L. W. 633 : A. I. R. 1944 Mad. 57; *Baijnath Lal* v. *Ramoodeen*, (1873-74) 1 I. A. 106 ; *Afzal Khan* v. *Abdul Rahman*, (1932) 36 L. W. 456 : 59 I. A 405 : 63 M. L. J. 664 : A. I. R. 1932 P. C. 235 ; *Issaku* v. *Seetharamaraju*, (1947) 2 M. L. J. 166: 60 L. W. 480 : I. L. R. (1948) Mad. 454 : A. I. R. 1948 Mad 1.

*A. No. 310 of 1976. *18th August*, 1980.

Appeal against the decree dated 21st June, 1975 of the Court of the Subordinate Judge. Devakottai in Original Suit No. 37 of 1971.

K. Rajan, for Appellant.

S. Thiyagaraja Iyer, for Respondent.

The judgment of the Court was delivered by

Natarajan, J.— The plaintiff in O. S. No 37 of 1971 on the file of the Court of the Subordinate Judge of Devakottai is the appellant. He filed the suit in *forma pauperis* for recovery of moneys due under a mortgage created by deposit of title deeds by the first defendant on 9th September, 1946 in favour of the plaintiff's father, one Lakshmanan Chettiar. The case of the plaintiff was to the following effect :

2. Defendants 1, 15 and 16 are brothers and were members of a joint Hindu family. A sum of Rs. 18,000 belonging to the joint family of the plaintiff and his father was deposited with the first defendant for earning interest. The deposit was made in the name of the plaintiff's mother, one Paripoornam Achi. When the plaintiff's father demanded repayment of the amount in Madras and insisted on furnishing of security in the event of non-payment, the first defendant executed a fresh deposit letter in favour of the plaintiff's father on 9th September, 1946 for a sum of Rs. 20,000. The said letter was executed at Madras and on 10th September, 1946 the first defendant delivered the title deeds pertaining to two items of properties, described as items 1 and 2 in the plaint schedule II with intent to create a security. Thus, an equitable mortgage by way of collateral security was made in favour of the plaintiff's father and the mortgage was still subsisting. Between the period 5th September, 1949 and 26th February, 1958, the first defendant had paid

certain sums of money amounting in all to Rs. 1,000 on several occasions towards the equitable mortgage. The plaintiff's father died on 22nd June, 1963 leaving as his heirs his son, (the plaintiff), his widow Paripooranam Achi, and a daughter by name Deivanai Achi. The plaintiffs mother and sister had released their shares in the mortgage amount in favour of the plaintiff by means of a registered release deed dated 21st September, 1968. Defendants 2 and 3, knowing full well the existence of the equitable mortgage, purchased the one-third share of the first defendant in item I of Schedule II property on 3rd March, 1958, in E. P. No. 81 of 1957 in O. S. No. 74 of 1950 on the file of the Sub Court, Devakottai. Likewise one Ramaswami Chettiar, who is the father of defendants 4 to 13 and the husband of the 14th defendant, purchased, with full knowledge of the equitable mortgage, the undivided one-third share of the first defendant in item 2 of Schedule II on 9th December, 1963, in E. P. No. 22 of 1962 in O. S. No. 4 of 1949 on the file of the Sub Court, Devakottai. The respective Court-auction-purchasers, having purchased the equity of redemption with knowledge of the subsistence of the mortgage, are legally bound to discharge the debt secured by the equitable mortgage. After the Court-auction-sale in their favour, defendants 2 and 3, in collusion with the mortgagor (first defendant) and his brothers, defendants 15 and 16, filed a suit O. S. No. 50 of 1969 on the file of the Sub Court, Devakottai for partition of the properties belonging to the joint family of defendants 1, 15 and 16 and obtained a fraudulent partition decree under which a small extent of property of meagre value was allotted to the share of the first defendant. Such a decree had been collusively obtained in order to defeat the plaintiff from realising the mortgage debt. Apart from the fraudulent nature of the suit, it is also bad in law for partial partition. The plaintiff made repeated demands on the first defendant and the Court-auction-purchasers of the one-third share in the mortgaged properties to pay the mortgage amount together with interest etc., but they proved of no avail. The fourth defendant died during the pendency of the suit and hence his legal representatives, defendants 17 to 21, were brought on record. Since defendants 2 and 3 as well as defendants 5 to 14 and 17 to 21 have purchased the one-third share of the first defendant with full knowledge of the subsistence of the mortgage, they are bound in law to discharge the mortgage debt. Except the properties mentioned in the plaint, defendants 1, 15 and 16 were not possessed of any other properties. Hence the plaintiff prayed for a mortgage decree being passed against defendants 1 to 14 and 17 to 21 directing them to pay a sum of Rs. 38,883.67 P. with subsequent interest and costs, and in the event of default, to direct the one-third share of the first defendant in the mortgaged items of properties being brought to sale ignoring the partition effected by means of the decree passed in O. S. No. 30 of 1959. Alternatively, the plaintiff prayed that if, for any reason, the partition effected in O. S. No. 50 of 1969 was considered by the Court to be a genuine one, the decree should provide for bringing to sale the portion of property in item 1 allotted to the first defendant in the partition suit and the undivided one-third share of the first defendant in item 2 of the properties.

3. The first defendant and defendants 5 to 13 and 15 to 21 (defendants 17 to 21 being the legal representatives of the deceased fourth defendant) remained absent and allowed the suit to proceed *ex parte*. Defendants 2 and 3 contested the suit and their defence, set out in the written statement of the second defendant and adopted by the third defendant, was to the following effect. Defendants 2 and 3 did not admit the truth and genuineness of the deposit transaction and the passing of consideration and, likewise, the execution of the deposit letter dated 9th September, 1946 and the deposit of title deeds on 10th September, 1946, for the purpose of creating an equitable mortgage. The truth and genuineness of the various payments on several dates said to have been made towards the mortgage were also not

admitted. Defendants 2 and 3 had advanced moneys to the first defendant and for the repayment of the same, the first defendant had executed promissory notes. For recovery of moneys due under the promissory notes, the suit O. S. No. 74 of 1950 was filed in the Sub-Court, Devakottai and the suit was decreed on 20th July, 1950. The one-third share of the first defendant in item 1 was attached and it was purchased in Court-auction on 3rd March, 1958, and the sale was confirmed and symbolical delivery was also obtained. Thereafter, O. S. No. 50 of of 1959 was filed for partition of the one-third share of the first defendant. An *ex parte* decree was passed and the first defendant attempted to have the *ex parte* decree set aside, but he failed before the trial Court. The appellate Court, however, ordered setting aside of the *ex parte* decree provided the first defendant furnished security, but the first defendant committed default and therefore, the partition decree became final. Later on, the first defendant, with a view to protract the proceedings, set up his two sons to file O. S No. 30 of 1965 before the District Munsif's Court, Devakottai, to set aside the decree in O. S. No 50 of 1959. The suit was dismissed and against that, the first defendant's sons filed A. S. No. 49 of 1966 and that was also dismissed . The sons then filed a second appeal to the High Court which was pending on the date of the institution of the present suit. (Subsequently, the second appeal has also been dismissed.) In the final decree proceedings in O S. No. 50 of 1959, a compromise final decree was passed and delivery was also effected. The sons of the first defendant applied to the executing Court for ordering re-delivery on the pretext that a larger extent of property had been taken delivery of and when those proceedings were pending, the first defendant has instigated the plaintiff to come forward with the present suit to make it appear that the properties were subject to an equitable mortgage, and hence, the plaintiff was not entitled to the grant of any relief in the suit. The defendants did not admit the plaint statement that the mother and sister of the plaintiff had released their rights under a release deed in favour of the plaintiff. In any event, defendants 2 and 3 were *bona fide* purchasers for value without notice and it was not correct to say that they had knowledge of the equitable mortgage before they purchased the first defendant's one-third share in the Court-auction-sale. They purchased the one-third share of the first defendant without knowledge of the equitable mortgage, and consequently, without any cloud on the title to the property. The plaintiff did not intervene in the execution proceedings, nor did he take steps to enforce his alleged equitable mortgage and so, he is estopped from seeking enforcement of the mortgage against defendants 2 and 3. It is false to say that there has been collusion between defendants 1 to 3 and 15 and 16. The compromise final decree was a *bona fide* one and fair and equitable in its terms and hence the plaintiff cannot ask for the decree being ignored and the property brought to sale. Even if the suit claim was true, it was barred by limitation.

4. The fourteenth defendant filed a separate written statement and contended that no amount was due to the plaintiffs's father or to the plaintiff under the alleged equitable mortgage and the genuineness of the mortgage transaction itself was disputed. Her husband, N. P. N Ramaswami Chettiar, did not purchase item 2 of Schedule II roperty with knowledge of the equitable mortgage. The plaintiff is estopped from enforcing the mortgage right as he did not intervene in the execution proceedings in which the mortgaged properties were brought to sale. The suit was barred by limitation. The payments and endorsements referred to by the plaintiff were not true. No amount was due to the plaintiff and the suit properties were not subject to any encumbrance. The suit had been filed by the plaintiff in collusion with the first defendant and therefore deserved to be dismissed with costs.

5. On the basis of the pleadings of the parties, the Subordinate Judge raised the following issues for consideration in the trial :

1. Whether the suit mortgage is true and valid ? (as recast by the trial Court) ;

2. Whether the partition set up by the defendants 2 and 3 is true, valid, equitable and binding on the plaintiff? (as recast);

3. Whether the suit is barred by Limitation? (as recast); and

4. To what relief is the plaintiff entitled? (as recast).

6. In the trial of the suit, the plaintiff examined P. Ws. No. 1 to 5 and filed Exhibits A-1 to A-24 and for the contesting defendants the second defendant alone was examined and no defence exhibits were filed. The trial Judge, on a consideration of the materials placed before him, answered issue 1 in favour of the plaintiff, but found against him on issues 2 and 3, and consequently, found under issue 4 that plaintiff was not entitled to any relief and dismissed the suit by judgment and decree dated 21st June, 1975. It is against the dismissal of the suit the plaintiff has preferred his appeal.

7. Notice to respondents 1, 4 to 7, 14 and 15 was dispensed with in the appeal. The rest of the respondents, except respondents 2 and 3, have not entered appearance in spite of service of notice on them.

8. Mr. K. Raja, learned counsel for the appellant-plaintiff, advanced arguments before us to contend that the findings of the Subordinate Judge on issues 2 and 3 are erroneous and unsustainable in law and facts and that the appellant is entitled to the reliefs claimed by him in the suit. Mr Murugaiyan, learned counsel for the second and third respondents, stated that his clients had conveyed their right in item 1 of the plaint schedule II tot he appellant himself and as such, the appeal is not maintainable against his clients. Mr. Raja refuted the statement of Mr. Murugaiyan and submitted that the appellant had not acquired the rights of respondents 2 and 3 in the concerned item of suit property and the appellant is entitled to prosecute the appeal against respondents 2 and 3 also. Consequently, we have heard Mr. Raja as well as Mr Murugaiyan with reference to the pleas put forward by the appellant and respondents 2 and 3 in the trial of the case.

9. The questions that fall for determination may be enunciated thus:-

1. Whether a sum of Rs. 18,000 was originally deposited with the first defendant by the appellant's father and whether in respect of that deposit, the first defendant was indebted in a sum of Rs. 20,000 to the appellant's father as on 9th September, 1946?

2. If the deposit was true, whether the first defendant deposited the title deeds of items 1 and 2 of Schedule II to the plaint on 10th September, 1946 and created an equitable mortgage by way of collateral security?

3. Whether the suit is barred by limitation

4. Whether respondents 2 and 3 were *bona fide* purchasers for value, without notice of the mortgage, of item 1 of Schedule II and, likewise Ramaswami Chettiar was a *bona fide* purchaser for value, without notice of the mortgage, of item 2 of Schedule II? and

5. Whether the appellant is entitled to ignore the partition decree in O. S. No. 50 of 1959 and seek enforcement of the mortgage by bringing to sale the one-third share of the first respondent in items 1 and 2 or plaint schedule II?

10. Taking up the first and second questions as they can be conveniently disposed of together, there does not appear to be any difficulty in accepting the appellant's case. Though defendants 2 and 4, in their respective written statements, had disputed the factum of the deposit as well as the creation of the equitable mortgage and put the appellant to strict proof of those matters, they do not appear to have seriously canvassed their objections before the trial Court. In any event, the appellant has incontrovertibly proved his case with reference to the deposit and the creation of the equitable mortgage. P. W. 5, the mother of the appellant, has stated that she sold her jewels and gave the money through her husband to the first respondent for being deposited with him for augmenting her funds and as on 9th September, 1946, she was entitled to get Rs. 20,498-2-6. When a demand was made for return of the same, the first respondent

paid Rs. 498-2-6 in cash and executed a fresh deposit letter, Exhibit A-1, for the sum of Rs. 20,000. The demand as well as the execution of Exhibit A-1 took place at Madras. There is further of evidence to show that on the next day *viz.*, 10th September, 1946, the first respondent delivered the title deeds, Exhibits A-3 to A-9, pertaining to the suit properties with intent to create an equitable mortgage by way of collateral security. P. W. 1 a close relation of the first respondent, has deposed about the first respondent executing the two deposit letters, Exhibits A-2 and A-1 respectively and about the first respondent depositing the title deeds at Madras and creating an equitable mortgage. P. W. 2, an Advocate's clerk, has deposed that the first respondent took advice from his master, *viz.*, Mr. Ramaswami, Advocate, as to how an equitable mortgage was to be created and on 10th September, 1946, he accompanied the first respondent to the appellant's father and witnessed the deposit of title deeds for the purpose of creating an equitable mortgage. Besides P. Ws. 1 and 2, P. W. 5 his also spoken about the first respondent executing Exhibit A-1 and depositing his title deeds on the next day by creating a mortgage by way of collateral security. The evidence of these witnesses is amply corroborated by the production of the original title deeds, Exhibits A-3 to A-9 by the appellant. Besides, it is also seen that the first respondent has made four payments between 1949 and 1958 totalling a sum of Rs. 1,000 and all those payments have been entered on the reverse of Exhibit A-2. These factors more than amply prove the truth of the appellant's case about the deposit of money with the first respondent and about his executing the deposit letter and creating an equitable mortgage over the suit properties by deposit of title deeds. Hence both these points are found in favour of the appellant.

11. Next in order comes the third question about the suit being within time or barred by limitation. The deposit letter, Exhibit A-1, has been executed on 9th September, 1946, and the equitable mortgage has been created the next day. The suit however has been filed on 16th September, 1969. It may be remembered that the suit has been filed *in forma pauperis* and 16th June, 1969, was the day when the petition under Order 33, rule 1, Civil Procedure Code was filed. As such, the suit has been filed beyond twelve years from the date of Exhibit A-1. However, the case of the appellant is that the first respondent had made four payments towards the mortgage and the last of such payments was made on 22nd September, 1958, and as such, the period of limitation was extended and by reason of such extension, the suit must be held to have been filed within time. The four payments referred to by the appellant have taken place on the following dates: Rs. 100 paid on 5th September, 1949; Rs. 100 paid on 15th August, 1952; Rs. 300 paid on 31st May, 1955 and Rs. 500 paid on 26th February, 1958. Besides, the appellant also relied upon two acknowledgments. Exhibits A-12 and A-13, made by the first respondent on 13th July, 1957 and 22nd September, 1958 respectively. Exhibit A-12 is a certified copy of the counter-affidavit filed by the first respondent in E. P. No. 81 of 1957 in O. S. No. 74 of 1950, Sub-Court, Devakkottai. Exhibit A-13 dated 22nd September, 1958, is yet another counter-affidavit filed by the first respondent in the same execution petition. In both those counter-affidavits the first respondent has clearly referred to the execution of the deposit letter and the creation of the equitable mortgage over items 1 and 2 of the plaint Schedule II and about the mortgage still subsisting. The Subordinate Judge has, however, taken the view that the payments made by the first respondent as endorsed by him on the reverse of Exhibit A-1, cannot save the period of limitation since the endorsements do not make any reference to the first respondent having executed Exhibit A-1 and depositing the title deeds for creating an equitable mortgage by way of collateral security. The trial Judge has further held that at best the endorsements could be taken to be acknowledgments of the deposit of money under Exhibit A-1 and not an acknowledgment of a subsisting mortgage liability; inasmuch as there are no details about the delivery of documents, the number of documents, the date of delivery

the creation of an equitable mortgage for the purpose of furnishing security and the subsistance of the mortgage, none of the endorsements, much loss the last one dated 26th February, 1958, could be taken as acknowledg ment so as to give a fresh period of limitation. For holding that Exhibits A-12 and A-13 also did not operate as acknowledgments for saving limitation, the Subordinate Judge has observed that the recitals in the counter-affidavit did not unequivocally refer to the deposit of title deeds, the nature of properties covered by them etc., and about the mortgage being subsisting. We are clearly of opinion that the view taken by the Subordinate Judge on the question of limitation is patently wrong and manifestly opposed to law. The Subordinate Judge has failed to see that with the creation of the equitable mortgage the debt became a secured one and the two transactions, *viz.*, the acknowledgment of liability under the deposit letter and the creation of the equitable mortgage, became an integrated transaction, and as a result thereof, endorsement of payment contained in Exhibit A-1 will automatically extend the period of the mortgage. There need not be, as the Subordinate Judge has thought, an independent acknowledgment of the mortgage liability. In this connection we need only refer to section 18 and 19 of the Limitation Act, 1963. Section 18 deals with the making of an acknowledgment of a liability before the expiration of the period prescribed for a suit or application in respect of a property or right. Section 19 deals with payment on account of a debt or of interest on a legacy being made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in that behalf, and a fresh period of limitation being computed from the time when the payment was made. The difference between the two sections has been succinctly set out in *Parasuraman* v. *Purushothaman and Co.*[1] and we may quote the relevant passage as we are in respectful agreement with the same. The passage runs thus :

"There is certainly a differenee between section 18 and section 19. As in the case of an acknowledgment under section 18, a payment under section 19 is also required to be recorded in writing. But, under section 18, the writing must contain within itself an admission of existing liability, while under section 19, it is sufficient if the writing merely records the fact of payment. An endorsement of payment need not imply an acknowledgment of liability: whereas an acknowledgment for the purpose of section 18 must be by the person against whom the property or right in question is claimed or by some person through whom he derives title or liability, a payment for the purpose of section 19 need only be by the person liable to pay the debt. An acknowledgment duner section 18 only operates against the person who makes the acknowledgment and those claiming under him, but subject to the provisions of sub-section (2) of section 20, a payment under section 19 saves limitation against all the persons who are liable for the debt".

Thus it may be seen that while under section 18 there should be an acknowledgment of liability, under section 19 an endorsement of payment need not imply an acknowledgment of liability. The mere fact of payment as evidenced by the endorsement will have the effect of extending the period of limitation. This aspect of the matter has been completely lost sight of by the Subordinate Judge. Once the liability of the first respondent under the deposit became secured by the creation of the equitable mortgage, it goes without saying that any endorsement of payment contained in the letter of deposit would automatically have the effect of extending the period of limitation for the secured debt. We may, in this connection, refer to *Veeraraghavayya* v. *Seetharamayya*[1], where the effect of endorsement on a note had to be construed vis-a-vis a contemporaneous agreement executed by the promisor to pay the amount in instalments.. The ratio laid

1. (1977) K. L. T. 696: A. I. R. 1977 Ker. 132 at 145-146.

1. (1943) 56 L. W. 633 : (1943) 2 M. L. J. 456 : A. I. R. 1944 Mad. 57.

down by Shahabudeen, J., as contained in the head-note, is to the following effect:

"Where a promissory note was executed and on the same date an agreement was also come to between the parties that the amount of the note should be paid in instalments, Held, that the promissory note and the agreements should be considered as parts of the same transaction and the endorsement on the note would give the indorsee the advantage which could be derived from the agreement, even though there is no separate assignment. Thus treated, an endorsement of payment on the note made more than three years from its execution would save limitation in respect of instalments payable within three years of the endorsement under the agreement abovementioned."

Applying this ratio which has our approval, we must hold that the payments made by the first respondent and evidenced by the endorsements contained in Exhibit A-1 would have the effect of extending the period of limitation for the equitable mortgage. Viewed thus, the last endorsement of payment made on 26th February, 1958, conferred on the appellant a limitation period of twelve years from that date to file the suit, and, inasmuch as the suit had been filed on 16th June, 1960 itself, we must hold that the suit was not barred by limitation. Apart from that, we also find that in Exhibits A-12 and A-13 the first respondent has categorically and unambiguously acknowledged his liability under the equitable mortgage and such acknowledgments clearly attract the application of section 18 of the Limitation Act. There was no necessity for the first respondent to refer in Exhibits A-12 and A-13 to the details of the mortgage transaction, such as the date of delivery of the documents etc. The acknowledgments in Exhibits A-12 and A-13 clearly refer to items 1 and 2 of Schedule II properties being subjected to the mortgage created in favour of the appellant's father and about the mortgage still subsisting. Hence Exhibits A 12 and A-13 also can be availed of by the appellant for effectively meeting the plea of limitation raised by the contesting respondents. Accordingly, we answer this question in favour of the appellant.

12. The penultimate question is with reference to the rights acquired by the Court-auction-purchasers when the mortgage was subsisting. There is no material for us to hold that respondents 2 and 3 had not parted with consideration for purchasing item 1 of Schedule II property. So too, the purchase of item 2 of Schedule II property by late Ramaswami Chettiar. But, on the question of notice, the Court-auction-purchasers cannot certainly plead want of knowledge of the subsistence of the mortgage when they purchased the respective items of properties. In Exhibits A-12 and A-13, which are the counter-affidavits filed by the first respondent in the execution proceedings, he has clearly referred to the creation of the equitable mortgage over the two items of properties in favour of the appellant's father and about the subsistence of the mortgage. In spite of the first respondent having brought to their notice the creation of the mortgage and the liability being still outstanding, the auction-purchasers, who were also the decree-holders, had not taken steps to amend the sale proclamation and bring the properties to sale subject to the rights of the mortgagee. The Subordinate Judge has not at all applied his mind to this aspect of the matter and, on the other hand, he has taken it for granted that the Court-auction-purchasers were *bona fide* purchasers for value without notice. The view of the Subordinate Judge is clearly wrong. Hence we answer the fourth question also in favour of the appellant.

13. There only remains the last question, *viz.*, whether the appellant can ignore the partition decree passed in O S. No. 50 of 1959 and enforce the mortgage by bringing to sale the one-third share of the first respondent in the mortgaged items of properties. The case of the appellant is that respondents 1 to 3, 15 and 16 colluded among themselves and brought about a collusive partition decree in O. S. No. 50 of 1959 whereunder the mortgaged items of properties were allotted as between the 15th and 16th respon-

dents and the Court-auction-purchasers and some worthless items of properties were allotted to the first respondent towards his share. Neither the plaint nor the decree passed in O. S. No. 50 of 1959 had been marked as an exhibit and therefore the details of the suit and the decree passed therein are not fully known. Even so, we find that respondents 2 and 3 had filed O S. No. 50 of 1959 for partition of the one-third share of the first respondent in item 1 of Schedule II Strangely enough, respondents 2 and 3 had not impleaded the appellant as a party to that suit even though they had knowledge of the subsistence of the mortgage. They had also been specifically put on notice by the appellant himself by means of the notice, Exhibit A-14 issued on 25th March, 1968. In that notice, the appellant has mentioned about the equitable mortgage created by the first respondent and he has also charged respondents 2, 3, 15 and 16 with having filed the partition suit, O. S. No. 50 of 1959 collusively and attempting to by-pass the mortgage and have the properties divided. Respondents 2 and 3 have sent a reply under Exhibit A-15 which contains nothing but a denial of the claim made by the appellant. Similarly, under Exhibit A-16 dated 9th February, 1968, the appellant has sent a notice to respondents 4 to 14 and brought to their notice the subsistence of the mortgage. Those respondents too rested themselves content by merely refuting the contentions of the appellant and sending a reply, Exhibit A-17. It is after the issue of these notices, respondents 1 to 3, 15 and 16 had entered into a compromise and brought about a compromise decree in the partition suit. According to the appellant, the first respondent has been given some worthless items of properties towards his one-third share The circumstances are more than enough to warrant the conclusion that the parties to O. S. No. 50 of 1959 had deliberately attempted to circumvent the mortgage liability by not allotting to the first respondent any portion of the two items of mortgaged properties and instead, allotting him some other items of properties. In spite of it, the Subordinate Judge, very strangely, has taken the view that there was absolutely nothing to show that the partition was *mala fide* and inequitable and that because the appellant (plaintiff) was not a party to O. S. No. 50 of 1959, it cannot be said that the partition action was fraudulent in character. The law on the question as to how far a mortgage created by one of two or more cosharers of his undivided share in the properties held jointly by all the co-sharers can affect the right of partition of the other co-sharers, is by now well-settled. The Privy Council, following its ratio in an earlier case, *Baijnath Lal* v. *Ramoodeen Choudhary*[1], laid down in *Afzal Khan* v. *Abdul Rahman*[2], as follows:-

> "Where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and the property so mortgaged is allotted on a subsequent partition to the other co-sharers, the latter take that property *in the absence of fraud* free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share." (Italics supplied)

This has been followed in *Issaku* v *Seetharamaraju*[3]. According to this ratio, respondents 15 and 16, the brothers of the first respondent, will be entitled to ask for partition and allotment of the mortgaged items of properties to their share free from the mortgage in spite of the creation of the equitable mortgage by the first respondent of his one-third share. However, their right to ask for partition is subject to the condition that their claim is not vitiated by fraud. In the instant case, the materials on record clearly spell out the practice of fraud. We have already referred to the Court-auction-purchasers purchasing the one-third share of the first respondent in the mortgaged items of properties in spite of being made aware of the creation and subsistence of the mortgage. Later on, when a partition suit was instituted by respondents 2 and 3, they as well as the other Court-auction-purchaser

1. (1873-74) 1 I . A. 106.
2. (1932) 36 L. W 456: L R. 59 I. A. 405: 63 M. L. J. 664: A. I. R. 1932 P. C. 235.
3. (1947) 2 M. L. J. 165: 60 L. W. 480: I. L. R. (1948) Mad. 454: A. I. R. 1948 Mad. 1 (F. B.)

were put on notice of the subsistence of the mortgage and warned of the consequences of any collusive arrangement being entered into. In spite of the notices, respondents 1 to 3, 15 and 16 had brought about a compromise partition decree and, in the said decree, the mortgaged items of properties have been allotted to the other parties and some other items of properties which, according to the appellant, are worthless, were allotted to the first respondent. Those materials clearly establish the practice of fraud by the respondents. In such circumstances, the normal rights available to co-sharers for asking for a partition of the mortgaged items of properties free of the mortgage cannot be claimed by respondents 15 and 16. The resultant position is that the appellant will be entitled to ignore the partition decree passed in O. S. No. 50 of 1959 and enforce the mortgage against the one-third share of the first respondent in items 1 and 2 of Schedule II properties.

14. In accordance with our conclusions, it follows that the appeal has to be allowed and the judgment and decree of the lower Court set aside. The appellant's suit will stand decreed and there will be a mortgage preliminary decree in favour of the appellant, directing the defendants 1 to 3, 5 to 14 and 17 to 21 to pay the appellant the sum of Rs. 38,883-67 p. with interest at 6 per cent. per annum from the date of plaint till the date of payment and costs, within three months from this date, failing which the one-third share of the first respondent in items 1 and 2 of plaint Schedule II will be sold for realising the amount and such sale will be effected in disregard of the partition decree passed in O. S. No. 50 of 1959. The Court-fee payable on the plaint as well as the memorandum of appeal will be paid by respondents 1 to 13 and 16 to 20.

15. This appeal having been set down for "Being mentioned" on this day the Court made the following Order :

The Order of the Court was made by

Natarajan, J.—The matter comes up before us for being mentioned. The learned counsel for the appellant states that the Court below has ordered costs to be borne by the respective parties and as such the award of costs in this appeal may be clarified as costs in the appeal. In view of the said representation, we make it clear that the award of costs will be in the appeal and as far as the suit is concerned, the parties will bear their respective costs.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Ehasan Bivi and others .... *Petitioners**

v.

Nagalakshmi Ammal .... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (8)—Petition for eviction filed by co-owner—Consent of other co-owner not obtained—Petition whether maintainable—Co-owner not an agent—Co-owner owns every part of the property—Petition held to be maintainable.

On a reading of section 10 (8) of the Tamil Nadu Act XVIII of 1960 it will be clear that only an agent of the landlord is liable to get the previous written consent of the landlord. Considering the reasons given in the Supreme Court decision reported in *Sri Ram Pasrichab* v. *Jagannatha*, (1976) 4 S. C. C. 184 : (1977) R. C. J. 494 : (1977) 1 S.C.R. 395 : A. I. R. 1976 S. C. 2335, it is very difficult to construe that a co-owner will take the position of an agent in respect of the management of a property, since it has been definitely held by the Supreme Court that a co-owner owns every part of

*C. R. P. No. 2083 of 1978. *12th September*, 1980

the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. [*Para.* 7.]

Cases referred to :—

Abdul Rahman v. *Ganga Chandrasekar*, (1978) 2 M. L. J. 234 : (1979) 1 Ren. C. J. 59 : 91 L. W. 519; *Alagiyanatha* v. *Swaminatha Pillai*, (1980) 1 M. L J. 274 : 93 L. W. 580; *Vasudevan* v. *Ramachandran*, (1980) 1 M.L.J. 534; *Sri Ram Pasricha* v. *Jagannath*, (1976) 4 S. C. C. 184 : (1977) Ren. C. J. 494 : (1977) 1 S. C. R. 395 : A. I. R. 1976 S. C. 2335; *Bicheva* v. *Venkatesa*, (1979) T. L. N. J. 312.

Petition under section 25 of Tamil Nadu Act XVIII of 1960 to revise the order of the Sub-Court, Kumbakonam in C. M. A. No. 5 of 1977 etc.,

B. Rajagopalan, for Petitioners.

N. Sankaravadivel, for Respondent.

The Court delivered the following

JUDGMENT.—The legal representatives of the tenant are the petitioners herein. The eviction was sought for in respect of three shops which are situate at No. 45-B, Hanumarkoil Road, Kumbakonam. The daily rent for each shop is Rs. 4. The eviction petition was filed by one Nagalakshmi Ammal. The eviction was sought on three grounds namely: (1) wilful default; (*ii*) demolition of the buildings and for reconstructing the same; and (*iii*) the tenants caused damages to the buildings by putting them to a different use from the one for which they were rented out. Both the Rent Controller and the Appellate Authority found that there was no default, much less wilful default on the part of the tenants. They ordered eviction on the ground that the landlord requires the buildings for demolition and reconstruction and also on the ground that the tenants have damaged the buildings. I do not think it is necessary for me to go into the merits of the case elaborately since Mr. B. Rajagopalan, learned counsel for the petitioners, is not able to make any headway to dislodge the concurrent findings given by the two authorities below on merits. I am satisfied from the evidence on record and also after going through the judgments of the two authorities below that the reasons given by the authorities below for ordering the eviction on the abovesaid two grounds are correct.

2. Mr. B. Rajagopalan, learned counsel, submits that the buildings in question originally belonged to one, Dr. Murthy and after his demise, his wife Nagalakshmi, the petitioner herein and her son Uadyakumar acquired this property. The petition for eviction was filed only by the wife of Dr. Murthy. *viz.*, Nagalakshmi Ammal. Mr. B. Rajagopalan, learned counsel for the petitioners, submits that the eviction petition is liable to be dismissed as per section 10 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act. According to the learned counsel, inasmuch as Udayakumar, the son of Dr. Murthy who is also a co-sharer in the property has not joined as a petitioner in the eviction petition, the present petitioner in the eviction petition has no *locus standi* to file the eviction petition without getting the written consent from the other sharer, namely, Udayakumar. In short, the learned counsel submits that Nagalakshmi Ammal being a co-owner, she is an agent for the other co-sharer in relation to the collection of rents from the tenants. As such Mr. Rajagopalan states that Nagalakshmi Ammal ought to have obtained the written consent of Udayakumar as per section 10 (8) of the Act before she came forward with the eviction petition. Section 10 (8) of the Act reads as follows :

> "Notwithstanding anything contained in this section, no person who is receiving or is entitled to receive the rent of a building, merely, as an agent of the landlord shall, except with the previous written consent

of the landlord, be entitled to apply for the eviction of the tenant".

Before dealing with the legal contentions taken by the learned counsel appearing for the petitioners herein, it is necessary to note that the other co-sharer is no other then the son of Nagalakshmi Ammal and that they are living together. It is also not disputed that the tenants are paying the rent only to Nagalakshmi Ammal and at no point of time there seems to be any dispute in collecting the rents by Nagalakshmi Ammal. It is also not the evidence of any of the parties to these proceedings that Udayakumar, son of Nagalakshmi Ammal, disputed the right of Nagalakshmi Ammal to manage the property and collect the rents from the tenants. In *Abdul Rahman* v. *Ganga Chandrasekar*[1], Ramaprasada Rao, CJ., has observed:

"Whether this provision (section 10 (8) of the above Act) would apply to a co-owner is doubtful. I am not, however, inclined to express an opinion on it".

After observing so categorically the learned Judge posed the question that even if a co-owner on given facts and circumstances of a case is considered to be an agent, is it necessary for him to get a written consent prior to the filing of the eviction petition? The learned Chief Justice interpreted the word 'previous' occurring in sub-section (8). Finally, the learned Chief Justice decided as follows:

"The intention appears to be that a co-owner shall not without the consent of others, file an application for eviction; and if a question arises as to whether he had obtained any such consent, which could be established, in the alternative even in the course of the proceedings and before eviction it would be ingenuous to extend the intendment of the prescription as meaning that the previous written consent should be given even before filing a petition to obtain an order for eviction. The entitlement of the owner for eviction of a tenant, referred to in sub-section (8) should be construed not literally but liberally. If therefore the written consent of the co-owners is obtained in the course of trial and before an order for eviction is obtained and if that written consent of the other co-owners sufficiently reflects the position that they gave the consent even at or about the time when the petition was filed, then the Court which appreciates such evidence could come to the conclusion that there has been such a previous consent as required under sub-section (8)."

1. (1978) 2 M. L. J. 234 : 91 L. W. 519 : (1979) 1 Ren. C. J. 59.

3. I do not think that from the abovesaid decision it can be conclusively held that the co-owner on the facts and circumstances of the case has to get the written consent of the other co-owner as provided under section 10 (8) of the Act.

4. In *Alagiyanatha* v. *Swaminatha Pillai*[1], Natarajan, J., dealt with a case in which two brothers owned a building. In that case by arrangement the petitioner in the eviction petition and his brother were collecting the rent in equal shares from the tenant of the building in question. In that situation one of the brothers filed a petition for eviction before the Rent Controller praying for the eviction of the petitioner on the ground of wilful default in paying the rent and also on the ground of *bona fide* requirement for his son's occupation. The other brother was not impleaded in the eviction petition as a party. There was also no contention in the petition that the petition was filed on behalf of the other brother also who is a co-owner of the property. In that case, the tenant raised an objection to the maintainability of the petition, without the other co-owner being a party to the proceedings. On those facts, the learned Judge held—

"Where there is more than one landlord for a building it must necessarily be held that any action taken against the tenant of the building seeking his eviction must

1. (1980) I M. L. J. 274 : 93 L. W. 580.

be instituted by all the landlords or at least by one or more of them on behalf of and for the benefit of all of them".

The case on hand can be easily distinguished from the case decided by Natarajan, J. n the case decided by Natarajan, J., there were admittedly two landlords for a single tenant. They were independently collecting the rent by mutual arrangement. In such circumstances, the learned Judge held that it is necessary to get the consent of the other landlord who is in the nature of a co-owner before any eviction petition is launched by the landlord In this case, there is only one landlord, *i. e.*, Nagalakshmi Ammal.

5. In *Vasudevan* v. *R. Ramachandran*[1], Balasubrahmanyan, J., dealing with section 10 (8) of the Rent Control Act held—

> "Every co-owner is in a real sense, the absolute owner of the entirety of the interest in the joint property. In this sense, a co-owner is by no means the agent of the other co-owner in respect of any interest in the property. On the incontrovertible position in law of co-owners who must be distinguished from agents, properly so called, section 10 (8) has absolutely no application to the petition filed in the present case for eviction of the tenant."

Admittedly, in that case, the eviction petition was filed by one of the co-owners. In this connection, it is interesting to note the decision reported in *Sri Ram Pasricha* v. *Jagannath*[2], wherein it has been held that a co-owner is as much an owner of the entire property as any sole owner of a property is. It has been further held that the co-owner owns every part of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property.

1. (1980) 1 M. L. J. 534.
2 (1976) 4 S. C C 184 : (1977 Ren C J 494 : (1977) 1 S. C. R. 395 : A. I. R. 1976 S. C. 2335.

6. Even apart from the abovesaid decision we have the Bench decision of our High Court reported in *Bichaya* v. *Venkatesa*[1], wherein the scope of section 10 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act came to be discussed. The Bench after referring to various other decisions on this aspect of the case has categorically laid down that the class of persons contemplated by section 10 (8) of the Act is a very limited class and only with reference to that class the requirement of obtaining the previous written consent of the landlord for filing a petition for eviction will apply. A reading of this decision will clearly eschew a co-owner coming under the definition of an agent contemplated under section 10 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act.

7 Further on a reading of section 10 (8) it will be clear that only an agent of the landlord is liable to get the previous written consent of the landlord. Considering the reason given in the Supreme Court decision reported in *Sri Ram Pasricha* v. *Jagannatha*,[2] it is very difficult to construe that a co-owner will take the position of an agent in respect of the management of a property, since it has been definitely held by the Supreme Court that a co-owner owns every part of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. I have already stated that the other co-owner in this case is no other than the son of Nagalakshmi Ammal, the petitioner in the eviction petition and that he is living with Nagalakshmi Ammal. It is only Nagalakshmi Ammal who is collecting the rents from the petitioners herein and she will squarely come under the definition of landlord. Inasmuch as I have held that she will not come under the definition of an agent contemplated in section 10 (8) of the Act, the argument advanced as if the eviction petition is not maintainable without the written consent of the co- owner cannot be

1. (1979) T L N. J. 312.
2. (1979) Ren. C. J. 494 : (1976) 4 S. C. C. 184 : (1977) 1 S. C. R. 395 : A. I. R. 1976 S. C. 2335.

sustained. Thus relying on the observations and reasonings given in the Bench decision of our High Court reported in *Bichava* v. *Venkatesa*[1], I do not find there is any merit in the contentions raised by the learned counsel appearing for the petitioners herein. Accordingly, the civil revision petition is dismissed with costs. Considering the business that is being carried on in the shops, the petitioners will have time to vacate till 30th November, 1980.

S. J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

G. R. Radhakrishnan .... *Appellant**

v.

Rani Ammal and others .... *Respondents.*

Specific performance of agreement to reconvey—Sale of immovable property by registered document—Agreement on next day to reconvey the property to vendor after a period of ten years from the date of sale—Agreement registered—Release of rights under agreement of reconveyance by unregistered deeds—Validity—Claim on basis only of will—Claim as heir not set up and therefore not allowable.

By a registered deed of sale, "N" and his sons (plaintiffs 2 and 3) conveyed the suit property to the defendant. On the next day the defendant executed a registered agreement to reconvey the property to "N" and his sons after a period of 10 years from the date of the sale. Subsequently "N" died leaving a will under which he bequeathed his properties to 1st plaintiff and the children of plaintiffs 2 and 3. The relevant schedule to the will included the suit property. The relevant portion of the will relating to the properties reads:

எனக்கு பிதுரார்ஜிதமாயும் சுயார்ஜிதமாவும் கிடைத்து என்சுவாதீன அனுபவத்திலுள்ளதும் தற்சமயம் வில்லங்கத்திலுள்ளதுமான அடியில் கண்ட ரூபாய் 50,000 (ஐம்பதாயிரம் ரூபாய்) மதிப்புள்ள சொத்துக்களை

The plaintiff sued for specific performance of the agreement for reconveyance. The first Court found against the will and that the term" " வில்லங்கம் " does not refer to the right of repurchase, but decreed specific performance to the extent of 2/9 of the suit property in favour of the plaintiff as one of the heirs of "N". The lower appellate Court found the will to be genuine but proceeded on the assumption that the will did not bequeath the right of the deceased under the reconveyance agreement. It held however that the plaintiff as an heir of "N" was entitled to specific performance of the entirety of the suit property. On appeal by the defendant,

Held:—An agreement of reconveyance does not create any interest in immovable property and therefore, there was no necessity for registering such an agreement. If the agreement of reconveyance does not create any interest in immovable property *a fortiori* a release of any right under that document will not also create any interest in immovable property and therefore, no registration is called for. There is no doubt that a release deed releasing a right under an agreement of resale does not require any registration. The question is not also *res integra* and is also covered by authority. [*Para.* 2.]

The term "வில்லங்கம்", in the context in which it was used had no reference to the right of reconveyance. [*Para.* 3.]

The plaintiff having claimed specific performance only on the basis of the will alone and not as heir of "N" a claim for specific performance as heir could not be allowed. [*Para.* 4.]

In view however of the defendant not having appealed against the first Court's decree

1. (1979) T. L. N. J. 312.

*S. A. No. 2463 of 1976. *8th September, 1980.*

granting specific performance of 2/9th share, it had become final and had to be confirmed.

Cases referred to:—

Chinnakkal v. *Chinnathambi Goundan*, (1934) 67 M. L. J. 635 : 40 L. W. 646 : A. I. R, 1934 Mad. 703 ; *Sellappa Chetty* v. *Marappa Gounder*, (1964) 2 M. L. J. 441 : I. L. R. (1964) 1 Mad. 691 : 77 L. W. 613 : A. I. R. 1965 Mad. 37 ; *Chief Controlling Revenue Authority* v. *Swami Gounder*, (1969) 2 M.L.J. 93 : I. L. R, (1969) 3 Mad. 17 : 82 L. W. 229 : A. I. R. 1970 Mad. 1 ; *Dayal Singh* v. *Indar Singh*, (1926) 53 I. A. 214 : 24 L. W. 396 : 51 M. L. J. 788 : A. I. R. 1926 P. C. 94.

V. Sridevan and *G. Narasimhalu*, for Appellant.

K. N. Balasubramanian, *T. Dhanyakumar* and *N. Jothi*, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed for specific performance of an agreement of reconveyance dated 10th January, 1958. The suit properties originally belonged to one Narasimhalu Naidu, father of the plaintiffs. The said Narasimhalu Naidu and his two sons who are the second and third plaintiffs in the suit, sold the properties to the defendant under a registered sale deed dated 9th January, 1958, for a sum of Rs. 10,000/-. On the next day, namely, 10th January, 1958, the defendant executed a registered agreement to reconvey the properties in favour of Narasimhalu Naidu and plaintiffs 2 and 3. This document stated that after a period of ten years from 9th January, 1958 and before 28th February, 1968, *i.e.*, between 10th January, 1958, and 28th February, 1968, the said Narasimhalu Naidu and the plaintiffs 2 and 3 shall have a right to re-purchase the properties for the sum of Rs. 10,000/-. The other relevant portion will be discussed a little later when the argument of the learned counsel based on the recitals is considered. On 6th May, 1959, the second plaintiff received a sum of Rs. 1,150/- from the defendant and in consideration of that money released whatever right he had under the agreement to reconvey. Similarly, the third plaintiff received another sum of Rs. 1,150/- and executed a release deed on 11th May, 1959, releasing whatever right he had under the agreement to reconvey. These two release deeds were unregistered documents. The plaintiffs' father Narasimhalu Naidu died on 11th April, 1966, leaving a will dated 5th June, 1965. Under the said will, the said Narasimhalu Naidu bequested his properties in favour of the first plaintiff and the children of plaintiffs 2 and 3. The schedule to this document included the suit properties in respect of which Narasimhalu Naidu and his two sons had a right of re-conveyance. Subsequent to the death of Narasimhalu Naidu, the second plaintiff made an endorsement on the agreement of reconveyance releasing his 1/9th share in the right of reconveyance referable to his right as an heir to his father, for a consideration of Rs. 500/-. The present suit was filed praying for a decree for specific performance by the defendant of the agreement of reconveyance dated 10th January, 1958 "by executing a conveyance in favour of the first plaintiff." It is stated in the plaint, "The plaintiffs state that the first plaintiff alone is entitled to obtain a reconveyance under the will of the late Narasimhalu Naidu. Plaintiffs 2 and 3 are not entitled to obtain a reconveyance or deal with the right of reconveyance of the late Narasimhalu Naidu in view of the terms of the testament of the father of the plaintiffs." The defendant filed a written statement mainly contending that the first plaintiff is not entitled to specific performance of the contract. For the sake of completeness, however, we may state that the defendant also questioned the truth and validity of the will and also that the suit properties were the joint family properties of Narasimhalu Naidu and they were not his self-acquisitions. Among the various grounds on which the defendant stated that the plaintiff is not entitled to specific performance, one of them was that the first plaintiff is not entitled to specific performance as the agreement provided that the rights therein cannot be assigned and as she does not claim as an heir of Narasimhalu Naidu in terms of the agreement. The trial Court found that

the will was not true and that, even if it were to be held to be true on a true construction of the same the first plaintiff did not get any right to enforce the re-purchase agreement. The trial Court also found that Exhibits B-5, B-6 and B-12 under which the second and third plaintiffs have released their rights do not require to be registered and that the second plaintiff gave up not only his 1/3rd right in the properties under the agreement of reconveyance but also his 1/9th share in the 1/3rd share of Narasimhalu Naidu. The trial Court also found that the third plaintiff had given up his one-third right under the agreement of reconveyance. The trial Court then proceeded to consider the claim of the plaintiffs as heirs of the deceased Narasimhalu and over-ruling the objection of the defendant that such a claim as heirs was never pleaded and could not be considered, held that the first plaintiff was entitled to specific performance of 2/9th share in the suit properties on deposit of the proportionate value in Court. This was on the basis that in the share of Narasimhalu Naidu each plaintiff was entitled to 1/3rd; *i. e.*, 1/9th of the total and since the third plaintiff had no objection for passing a decree in respect of his share also in favour of the first plaintiff, the first plaintiff will be entitled to 2/9th share. Accordingly, the suit was decreed directing the defendant to execute a sale deed in respect of 2/9th share in the suit properties subject to the first plaintiff depositing the proportionate value in the Court within one month from the date of the decree. The trial Court also directed each party to bear their own costs. The defendant preferred A. S No. 164 of 1971 against that part of the decree refusing at least proportionate costs in the suit. The plaintiffs preferred an appeal (A. S. No 10 1972) claiming that the suit should have been decreed in its entirety and not with reference to 2/9th share in the suit properties alone. The learned District Judge held that the will was true and genuine and that the plaintiffs have properly proved the same. On the ground that the agreement to reconvey is one and indefeasible and even one of the persons in whose favour the agreement was executed is entitled to enforce the entirety of the agreement the lower appellate Court proceeded to consider whether the first plaintiff was entitled to get reconveyance of the entirety of the properties. Accepting the finding of the trial Court that the will does not refer to the reconveyance and it did not bequeath the right under the document in favour of the first plaintiff or the children of plaintiffs 2 and 3, the learned District Judge proceeded to consider as to whether the first plaintiff will not be entitled to claim specific performance as an heir of Narasimhalu Naidu. The learned Judge then held that Exhibits B 5, B-6 and B-12 are unregistered release deeds and that release of the right under the agreement to reconvey could be done only by a registered document as it related to immovable property and since the documents were unregistered they are inadmissible in evidence and no reliance can be placed on Exhibits B-5, B 6 and B-12. Since the second and third plaintiffs had no objection for executing a reconveyance document in favour of the first plaintiff the appeal of the plaintiffs was allowed directing the defendant to execute a sale deed in favour of the first plaintiff in respect of the entirety of the properties. The defendant has preferred this second appeal.

2. The first legal contention which has to be considered and disposed of relates to the admissibility of Exhibits B-5, B-6 and B-12. As already stated, under these three documents the second and third plaintiffs had released whatever right they had under the agreement for reconveyance dated 10th January, 1958. The agreement to reconvey was a registered document. But there could be no doubt and it has also been held so in the decision reported in *Chinnakkal* v. *Chinnathambi Goundan*[1], that an agreement of reconveyance does not create any interest in immovable property and therefore, there was no necessity for registering such an agreement. If the agreement of reconveyance does not create any interest in immovable property, *a fortiori* a release of any right under that document will not also create

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1. (1934) 67 M. L. J. 635: 40 L. W. 646: A. I. R. 1934 Mad. 703.

any interest in immovable property and therefore, no registration is called for. I have, therefore, no doubt that a release deed releasing a right under an agreement of re-sale does not require any registration. The question is not also *res integra* and it is also covered by an authority, *viz., Sellappa Chetty* v. *Marappa Goundar*[1]. In that case, the right of reconveyance was assigned under an unregistered document in favour of the plaintiffs in that case. The question for consideration was whether the assignment deed required any registration. It was held by the Division Bench that the assignment of the agreement to reconvey did not convey any present interest in immovable property and that, it does not require to be registered. The decision in *Chief Controlling Revenue Authority* v. *Swami Gounder*[2], did not deal with the question relating to registration. But the question for consideration in that case was whether an instrument by which the vendor gave up the right to reconveyance was a release falling under Article 55 of Schedule I of the Stamp Act or was a conveyance under Article 23. It was held that it was not a conveyance and it is a mere release deed. The question whether it has to be registered or not did not fall to be considered in that case. The decision of the Privy Council in *Dayal Singh* v. *Indar Singh*[3] was based on the particular recitals in the agreement of sale where substantial amount was also paid. On the terms of the document the Privy Council held that an interest in immovable property was created and that, therefore, it was compulsorily registrable under section 17. It is not an authority for the position that every agreement for sale or for reconveyance is compulsorily registrable. The two decisions in *Chief Controlling Revenue Authority* v. *Swami Gounder*[2] and *Dayal Singh* v. *Indar Singh*[3] relied on by the learned District Judge, were, therefore no authorities for the position that the release deeds executed by plaintiffs 2 and 3 (in this case) are compulsorily registrable. The finding of the learned District Judge that Exhibits B-5, B-6 and B-12 are inadmissiable in evidence is, therefore, clearly against law and cannot be accepted.

3. The next substantial question that was argued by the learned counsel for the defendant (appellant) is that under the terms of the will the first plaintiff did not get any right to enforce the agreement of reconveyance dated 10th January, 1958. The relevant portion of the document relating to the property that was conveyed reads as follows :

> "எனக்கு பிதுராஜ்ஜிதமாயும் சுயார்ஜ்ஜிதமாயும் கிடைத்து என் சுவாதீன அனுபவத்திலுள்ளதும தற்சமயம் வில்லங்கத்திலுளதுமான அடியில் கண்ட ருபாய் 50,000/- (ஐம்பதாயிரம் ருபாய்) மதிப்புள்ள சொத்துக்களே".

The schedule to the document not only refers to the propertes that were the subject-matter of the right of reconveyance but also other properties. The learned counsel for the plaintiffs contended that the word "வில்லங்கம்" used in the above-extracted portion refers to the right of reconveyance and not any other encumbrance over the properties. Apart from the fact that there no evidence to show that the deceased had not created any encumbrance over any of the properties in the schedule and that, therefore, the word "encumbrance" referred to therein could not relate to any other encumbrance but only to the right of re-sale it is not also acceptable that the word "வில்லங்கம்" or encumbrance can be said to refer to the right of re-purchase of the suit properties. An encumbrance is normally created by the owner of the property and so far as the properties that are the subject-matter of the suit are concerned they had already been purchased by the defendant and if the reconveyance is to be considered as even an encumbrance it could only refer to encumbrance created by the defendant and not an encumbrance created by the deceased

1. (1964) 2 M. L. J. 441: (1964) I. L. R. 1 Mad. 691: 77 L. W. 615: A. I. R. 1965 Mad. 37.
2. (1969) 2 M. L. J. 93 : I. L. R. (1969) 3 Mad. 17: 82 L. W. 229: A. I. R. 1970 Mad. 1.
3. (1926) 53 I. A. 214 : 24 L. W. 396: 51 M. L. J. 788: A.I R. 1926 P.C. 94.

Narasimhalu. In fact, though the trial Court held that the word "விஸ்லங்கம்" in the above extracted portion does not refer to the right of re-purchase, the learned District Judge did not give any different finding. The appellate Court proceeded on the assumption that the will did not bequeath to the first plaintiff the right of the deceased under the reconveyance agreement, but proceeded to consider the right of the first plaintiff for specific performance as an heir to the deceased. The finding of the trial Court that the will did not bequeath the right of Narasimhalu Naidu under the deed of reconveyance was, therefore, to be considered to have been confirmed by the finding of the lower appellate Court also. Though some plausible argument could be advanced on the basis that there is a reference to the properties which are the subject-matter of the suit in the schedule to the will, I am unable to agree with the learned counsel for the respondents that from the mere fact that the schedule included the suit properties, the word "விஸ்லங்கம்" is to be understood as having a reference to the right of re-purchase. I may add that as pointed out by the learned counsel for the appellant (defendant) certain properties which had already been conveyed are also included in the schedule and that shows that without reference to any right of the deceased the properties have been indiscriminately included in the schedule in the unregistered will. I am unable to interfere with the finding of the lower appellate Court that in this particular case, in the context in which the word "விஸ்லங்கம்" is used, it has no reference to the right of reconveyance.

4. The learned counsel for the respondents then strenuously contended that even if the will did not bequeath any right under the agreement in favour of the first plaintiff or any of the plaintiffs, since the plaintiffs, as the daughter and the sons of the deceased Narasimhalu Naidu are Class I heirs and all of them are before Court they are entitled to claim specific performance as heirs of Narasimhalu Naidu. He also refers to the terms of Exhibit A-2 as entitling the heirs to enforce the agreement. In the plaint, the plaintiffs had not claimed specific performance as heirs of Narasimhalu Naidu or on the basis of any of the recitals in the deed of reconveyance. In fact, the plaint stated, "the first plaintiff alone is entitled to obtain a reconveyance under the will of the late Narasimhalu Naidu and plaintiffs 2 and 3 are not entitled to obtain a reconveyance or deal with the right of reconveyance of the late Narasimhalu Naidu in view of the terms of the testment of the father of the plaintiffs." The claim was, therefore, definitely based on the will and but for such a claim the first plaintiff alone would not have been entitled to a claim for specific performance. She did not claim as the heir of Narasimhalu Naidu and as such, it is not possible for the plaintiffs to put forward any case for specific performance as heirs of their father. The argument of the learned counsel for the defendant on this point is not technical but it is one of substance. If the plaintiffs had come forward with a case that they are entitled to enforce the agreement of reconveyance as heirs of the said Narasimhalu Naidu, there might have been quite a number of defences open to the defendant, which we cannot visualize or state with definiteness in this case. In fact, it might have been open for the defendant to plead that they are neither the legal heirs nor entitled to the benefit by reason of any conduct or for any other reason. Suffice it to say that since that was not put in issue and the defendant did not have any opportunity of stating his case with reference to the same, it could not have been dealt with by the trial Court during the arguments or by the appellate Court. The case could not, therefore, be proceeded with on the basis that the plaintiffs, even apart from the will, are entitled to enforce the agreement for reconveyance. In fact, one of the pleas raised by the defendant in the written statement is that the first plaintiff is not entitled to specific performance as the agreement provides that the rights therein cannot be assigned and as she does not claim as an heir of the deceased Narasimhalu Naidu in terms of the agreement. We have, therefore, to proceed on the basis that the right to enforce the agreement was based solely on the terms of the will and since, as I have already held that the terms of the will did not enable the first plaintiff to file a suit, the present suit was not maintainable.

5. The learned counsel for the respondents then vaguely pleaded that there is some sort of fiduciary relationship between the defendant and the second plaintiff and that precluded the defendant from acting in any manner prejudicial to the plaintiffs and that, therefore, it was not open to him to plead in this case that the right of reconveyance was not enforceable, in its entirety. It appears that the defendant is an advocate and in cross-examination though denied any connection with Narasimhalu Naidu in his professional capacity admitted that under Exhibit A-10 the defendant had issued a notice on behalf of the second plaintiff to one Chokkammal in connection with some matter which is totally unconnected with the proceedings herein and that too, in the year 1964. I am unable to see how from this fact any fiduciary capacity could be claimed as established between the plaintiffs and the defendant requiring any *uberrimae fides* or any other particular conduct on the part of the defendant It may also be mentioned that second plaintiff as P. W. 1 has come and admitted in his evidence that the sale-deed Exhibit B-4 dated 9th January, 1958, was for adequate consideration. In fact, he has stated that it would have been worth only Rs. 9,000 at that time though the sale was for Rs. 10,000. In such circumstances, therefore I am unable to find any point in the argument of the learned counsel for the respondents that there existed any fiduciary relationship between the defendant and the plaintiffs or that any further conduct other than a normal procedure was expected from the defendant in the matter of purchase or executing the agreement of reconveyance.

6. It was then contended by the learned counsel for the plaintiffs-respondents that the first plaintiff was entitled as one of the heirs of Narasimhalu Naidu to get a reconveyance of the entirety of the properties on payment of the consideration of Rs. 0,000. The argument proceeded on the assumption that even apart from the will the plaintiffs as heirs of Narasimhalu Naidu are entitled to file the suit for specific performance. As already stated since they did not proceed on the basis that their claim is based on heirship this point does not arise for consideration. But even otherwise, I am unable to accept this argument because, essentially, the relief of specific performance is an equitable remedy. The defendant in this case had paid Rs. 1,150 to each of the plaintiffs 2 and 3 as early as in May, 1959 when he got the release deeds and he had also given Rs. 500 to the second plaintiff after the death of Narasimhalu Naidu. In granting an equitable relief I could not ignore these payments by the defendant to plaintiffs 2 and 3 which are not disputed. Naturally, therefore, the value of the properties of the defendant is much more than what he agreed for at the time when he executed the reconveyance. The plaintiffs have never offered to reimburse the defendant the amount which they had received with or without interest and the equitable relief, therefore, could not be claimed by the plaintiffs in this suit. The plaintiffs are not therefore entitled to any decree for specific performance and the suit, was, therefore, liable to be dismissed. But since the decree of the trial Court granting specific performance of 2/9th share in the suit properties in favour of the first plaintiff was not questioned in appeal by the defendant it had become final and the decree of the trial Court will have, therefore to be confirmed, and accordingly, the judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial Court are confirmed. Though the defendant had filed an appeal in the lower appellate Court against that portion of the decree disallowing costs in his favour, I do not think I can interfere with the judgment of the trial Court even on that aspect. The second appeal is accordingly allowed. The judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial Court are restored. There will be no order as to costs in this second appeal.

7. The appellant will be entitled to refund of any costs if he had paid to the respondents in pursuance of the decree of the lower appellate Court. Any money deposited by the appellant pending the second appeal in pursuance of any interim order granted by this Court will also be refunded to the appellant-defendant.

R. S. —— *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Hathibudi Anandar ... *Petitioner**

v.

Govindan .... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (3) (iii) —Petition for eviction by landlord on ground of building being required for purpose of business of his foster son — Petition not maintainable.

A son, in the generally accepted sense, is one who is begotten. Most legal systems also recognize, as a son, one who is taken in adoption. A foster son is neither begotten nor taken in adoption. He is merely fostered that is to say, brought up by his foster parents. He lacks the vital element which attaches to a natural born son. He lacks too the legal cognition which is accorded to an adopted son; it is a sentimental relationship which is pure and simple. A foster son is no son at all. The suffix 'son' is permitted to him only as a matter of common courtesy. He cannot therefore be held to be a member of the landlord's family within the meaning of section 2 (6-A) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Nor can a landlord invoke section 10 (3) (a) (iii) of the Act to compel his tenant to make way for his foster son, however close the landlord may feel towards that foster son. The landlord's plan for eviction of the tenant in this case ought properly to have been rejected on the very face of the landlord's pleadings to the effect that the building was required to set up his foster son in business.

[*Para.* 4.]

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Court of the Subordinate Judge, Tiruchirapalli dated 12th February, 1979 and made in C. R. P. No. 24 of 1976 (R.C.O.P. No. 381 of 1974 on the file of the Court of the First Additional District Munsif (Rent Controller), Tiruchirapalli).

M. N. Krishnamani, for Petitioner.

R. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is the tenant of a non-residential building in Woraiyur, Tiruchirapalli. The landlord applied to the Rent Controller for an order of eviction under section 10 (3) *(a)* *(iii)* of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1961. The landlord stated in his petition that he required the building *bona fide* for setting up therein a retail business in rice to be carried on by his foster son. The tenant resisted the petition. But the Rent Controller ordered eviction. The order was confirmed in appeal by the appellate authority.

2. In this revision, the tenant questions the validity of the order of eviction on the ground that a tenant cannot be evicted to accommodate a landlord's foster son. The argument is that a foster son is not

*C.R.P. No. 646 of 1979. 18th November, 1980.

comprehended within the ambit of the expression, 'member of the family' occurring in section 10 (3) (a) (iii) and defined in section 2 (6-A), of the Act.

3. I uphold this contention as well-founded. While a landlord can apply for an order for possession under section 10 (3) (a) (iii) either for his own benefit or for that of a member of his family, the Act takes care to enumerate who are all the persons who can be regarded as members of the landlord's family for the purposes of the Act. The enumeration of members of a landlord's family is rendered in section 2 (6-A). Under that enumeration, the landlord's son, daughter, grand-child and dependent-parent would all be members of his family. The contention of the tenant in this revision is that a landlord's foster son cannot be regarded as a son within the meaning of the provision.

4. I must uphold this contention as a matter of construction. The legislature has left the expression 'son' undefined, but I do not think the lack of a definition raises any difficult problem of construction or application. A son, in the generally accepted sense, is one who is begotten. Most legal systems also recognize, as a son, one who is taken in adoption. But a foster son is neither begotten, nor taken in adoption. He is merely fostered, that is to say, brought up by his foster parent. He lacks the vital element which attaches to a natural-born son. He lacks too the legal cognition which is accorded to an adopted son. His relationship to the foster parent is not a jural relationship; it is a sentimental relationship, pure and simple. A foster son is thus no son at all. The suffix 'son' is permitted to him only as a matter of common courtesy. It follows, therefore, that he cannot be held to be a member of the landlord's family within the meaning of section 2 (6-A) of the Act. It follows further that a landlord cannot invoke section 10 (3) (a) (iii) of the Act to compel his tenant to make way for his foster son, however close the landlord may feel towards that foster son. The landlord's plaint for eviction of the tenant in this case ought properly to have been rejected on the very face of the landlord's pleadings to the effect that the building was required to set up his foster son in business. The order passed by the Rent Controller and the appellate authority to the contrary must therefore be vacated.

5. Mr. R. Srinivasan, learned counsel appearing for the landlord, objected to the revision being disposed of on the ground aforesaid. He said that this point about a foster son not being a son was not put forward by the tenant before the Rent Controller or the appellate authority.

6. I do not, however, think it has very much mattered at all in this case that the question of law is being raised and considered for the first time now in revision. It certainly could not have put the landlord at a disadvantage as a party to the proceedings, For the inquiry in the revision has involved no more than an examination of the very provision which the landlord has invoked as being applicable to the very facts which he has pleaded in his petition for eviction. Learned counsel's objection cannot therefore be sustained on any view of procedural technicalities.

7. In the result, the civil revision petition is allowed. The order of eviction passed by the Rent Controller and confirmed by the appellate authority is set aside. The eviction petition filed by the landlord is dismissed. There will, however, be no order as to costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam* and *V. Sethuraman, JJ.*

Ponnusamy and others ... *Appellants**

v.

The Tamil Nadu State Wakf Board, through its Secretary ... *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 25 (a) and section 52—G O. Ms. No. 1742, dated 9th July, 1969—Concession to Wakf Board in paying Court-fee—Suit for recovery of wakf property—Fixed court-fee paid—Appeal by defendant—Whether G. O. can be taken advantage of.

The Government Order reducing the court-fee payable by the Wakf Board in a suit filed by the Board for recovery of possession of wakf property from third parties to Rs. 15 will not apply to the defendant in a suit who files an appeal against the decision rendered in such a suit. Section 52 of the Tamil Nadu Court-fees and Suits Valuation Act states that the fee payable in an appeal shall be the same as the fee that would be payable in the Court of first instance on the subject-matter of the appeal. The explanation does not use the expression "the fee that was paid in the Court of first instance" but uses the words "the fee that would be payable on the relief in the Court of first instance". The fact that the Wakf Board was entitled to pay the fixed court-fee of Rs. 15 in a suit filed for recovery of the wakf property will not enable the defendant when he files the appeal against the judgment in that suit to pay the same fixed court-fee as that will not be the fee "payable on the relief in the Court of first instance" if the suit were to be filed by the defendant In this view of the matter the appellant herein has to pay court-fee *ad valorem* on the market value of the property under section 25 (*a*) as the suit has been filed for declaration of title and for possession of the property.

[*Para.* 1.]

*S. A. No. 466 of 1976.

22nd August, 1980.

Appeal against the decree dt. 11th March, 1976 of the Court of Principal Subordinate Judge, Ramanathapuram at Madurai and made in Original Suit No. 30 of 1974.

K. Ramamurthy, for *R. Nadanasabapathy* and *D. Nelson*, for Appellants.

S. M. Hameed Mohideen, for Respondent.

The Judgment of the Court was delivered by

Ramanujam, J.—When the above appeal filed by some of the defendants in O S. No. 30 of 1974 on the file of the Sub-Court, Ramanathapuram at Madurai was taken up for hearing, the learned counsel for the respondent-wakf Board raised a preliminary objection that proper court-fee had not been paid on the memorandum of grounds of appeal and unless the appellants pay the requisite court-fee, the appeal cannot be proceeded with. The learned counsel for the respondent contended that the appellants have paid a fixed court-fee of Rs. 15 in the appeal memorandum instead of paying the court-fee under section 25 (*a*) of the Court-fees and Suits Valuation Act read with section 52 and that the concession of paying a court-fee given by G O. Ms No. 1742, Home, dated 9th July, 1969 is available only to the Wakf Board when it files the suit for recovery of possession of wakf property and that the defendant in a suit filed by the Wakf Board cannot take advantage of the said concession and pay a fixed Court-fee. The learned counsel relies on a judgment of a Division Bench of this Court in A. S. No. 342 of 1971 wherein under similar circumstances, the defendant who had filed an appeal as against the judgment in a suit filed by the Wakf Board was directed to pay the court-fee *ad valorem* on the value of the appeal on the ground that he is not entitled to pay the fixed court-fee referred to in the Government Notification giving concession in regard to suits filed by the Wakf Board alone We are in entire agreement with the view taken in that case by the Division

Bench. The said Government order reducing the court-fee payable by the Wakf Board in a suit filed for recovery of possession of wakf property from third parties to Rs. 15/- will not apply to the defendant in a suit who files an appeal against the decision rendered in such a suit. Section 52 of the Tamil Nadu Court-fees and Suits Valuation Act states that the fees payable in an appeal shall be the same as the fee that would be payable in the Court of first instance on the subject matter of the appeal. *Explanation* (1) to that section is as follows :

> "Whether the appeal is against the refusal of a relief or against the grant of the relief, the fee payable in the appeal shall be the same as the fee that would be payable on the relief in the Court of first instance."

The explanation does not use the expression "the fee that was paid in the Court of first instance" but uses the words "the fee that would be payable on the relief in the Court of first instance". The fact that the Wakf Board was enabled to pay the fixed Court-fee of Rs. 15/- in a suit filed for recovery of the wakf property will not enable the defendant when he files the appeal against the judgment in that suit to pay the same fixed court-fee as that will not be the fee payable on the relief in the Court of first instance if the suit were to be filed by the defendant. In this view of the matter, we are of the view that the appellant herein has to pay court-fee *ad valorem* on the market value of the property under section 25 (*a*) as the suit has been filed for declaration of title and for possession of the property.

2. The appeal has been valued for the purpose of jurisdiction and court-fee at Rs. 25,100 which is the value of the suit properties mentioned in the plaint. The appellants, therefore, have to pay *ad valorem* court-fee on the value of the appeal, namely, Rs. 25,100.

3. The appellants undertake to pay the court-fee if some time is granted for that purpose. The appellants shall pay the deficit court-fee on or before 30th June, 1980.

4. This appeal coming on for further hearing as Friday the 22nd day of August, 1980 in the presence of Mr. R. Nadanasabapathy, Advocate for the Appellant and Mr. S. M. Hameed Mohideen, Advocate for the respondent, the Court made the following Order.

5. By an order dated 16th April, 1980, we directed the appellant to pay the deficit court-fee on the memorandum of grounds of appeal on or before 30th June, 1980. But so far the deficit Court-fee has not been paid. The learned counsel for the appellant says that the appellant is unable to pay the court-fee. Hence the appeal is dismissed for non-payment of the deficit court-fee. There will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Bagiammal ... *Petitioner**

v.

Subramaniam and others ... *Respondents.*

Limitation Act (XXXVI of 1963), section 5—Petition to set aside ex parte *decree—Delay of seventy-nine days—Delay attributed to petitioner being ill with heart disease and jaundice — Court to make humanistic approach—Petition allowed.*

On the question whether a delay of 79 days in filing an application to set aside an *ex parte* decree alleged to be due to petitioner's illness, should be excused,

*C. R. P. No. 975 of 1980.

30*th January*, 1981.

Held: The Court was entitled to bring to bear a humanistic approach to its decision, once it was convinced that the illness alleged was real and not feigned. In the instant case the man was past middle age, affected by cardiac trouble and down with jaundice to boot. Both ailments are notoriously serious particularly at this stage of a man's life even if one rules out further complications. Not only is recovery a slow process, but it would call for a period of nursing and prolonged rest in bed. It would not therefore be reasonable to regard the delay in this kind of case as inordinate. [*Para*. 3.]

P. Ananthakrishnan Nair and *C. Govindan*, for Petitioner.

J. R. Doss, for Respondent.

The Court made the following

ORDER:—The question in this revision is whether the Court below acted right in allowing an application under section 5 of the Limitation Act and excusing the delay, a matter of 79 days or so. The delay involved was in the filing of an application for setting aside an *ex parte* decree. The defendants who applied for this relief were a husband and wife. Their explanation for the delay was that the husband was ill with heart disease and also jaundice, and was taking treatment away from home. Although the plaintiff opposed the application under section 5, there was not a word of effective denial in his counter affidavit either of the illness alleged or its treatment. All that was urged by the plaintiff was that the allegations of illness were "not proper" and were "unbelievable" as though he was reviewing those allegations and not traversing them. In the event the learned Judge disposed of the matter thus:

> "The ill health pleaded in the petition seems to be not unbelievable.
>
> I believe it and ignore the objection of the plaintiff"

The learned judge accordingly allowed the application under section 5 subject to payment of costs to the plaintiff.

2. In this revision the plaintiff's learned counsel is not minded to find fault with the Court below for having accepted the factum of ill-health pleaded by the defendants. What learned counsel urges is that illness as such could not serve as sufficient cause.

3. The argument addressed in such broad fashion does not seem to me to further purposeful discussion. For the inquiry under section 5 can be properly directed only if one asks the question whether given the kind of illness in the case it would not amount to sufficient cause. Approaching the present matter in this way, can it be said that the Court below was wrong in its determination? I think not. I do not mean to suggest that every time something delays an application or other proceedings a mere allegation by him that he was ill must be accepted as a sufficient cause without proof. In the present case the Court below had proceeded to judge the situation on broad probabilities as to the nature and effect of the illness and this was entirely by the defendants and their consequential inability to pursue the proceedings in time. I think the Court was entitled to bring to bear a humanistic approach to its decision, once it was convinced that the illness alleged was real and not feigned. For here is a man past middle age who was affected by cardiac trouble and who was also down with jaundice to boot. What would be his position under such conditions the one affecting the heart and the other affecting the liver? Both ailments are notoriously serious, particularly at this time of a man's life even if one rules out further complications. Diseases of this kind have a tendency to debilitate even strong constitutions. Not only is recovery a slow process, but it would call for a period of nursing and prolonged rest in bed. It would not therefore be reasonable to regard the delay in this kind of case as inordinate once we grant as we must in this case that the prime cause for it was diseased heart and or jaundiced liver.

4. The plaintiff's learned counsel then said that of the two defendants who had committed the delay, the excuse offered

could operate in favour of one alone and not the other. Learned counsel said it was the husband who was reported sick not the wife and that being so, the application under section 5 must have been dismissed as against the latter at least in any case.

5. This argument again burks the realities. Any ordinary observer of the homes of cardiac patients would know that the reverberations the disease produces in the family circle are of a kind and intensity which no other disease produces except perhaps cancer. There is no suggestion in this case that the wife was living apart from her sick husband. One might therefore, accept the illness of the one as a determining factor for the enforced delay of the other as well.

6. The final criticism that the plaintiff's learned counsel uttered was about the brevity of the order. The point really diverts the discussion from the merits of a Court determination to its composition, as judicial probe. I do not think myself that the length of a judge's decision can be the basis of an intelligent legal argument. Brevity is often a matter of style or shall I say, of the writer's upbringing What we must look for in a piece of legal writing is not whether it is short but whether it is to the point. Besides I am not sure that in these days of judicial prolixity economy in expression is not a forensic virtue to be fostered rather than discouraged at least in interlocutory proceedings.

7. The order under revision thus survives every one of the contentions urged on behalf of the plaintiff. The revision petition is accordingly dismissed. There will be however no order as to costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *M. M. Ismail, CJ. and M. A. Sathar Sayeed, J.*

P. Narayanaswamy ... *Appellant**

v.

The Director of School Education, Madras ... *Respondent.*

Probation of Offenders Act (XX of 1958), section 12—Tamil Nadu Educational Rules, rule 154—Section 12 of the Probation of Offenders Act no bar to proceedings under rule 154 of the Tamil Nadu Educational Rules.

Where though a Headmaster was convicted of an offence under section 120-B, Penal Code he was released under section 4 (1) of the Probation of Offenders Act and reinstated but, later on action was taken against him under rule 154 of the Tamil Nadu Educational Rules and his T. S. L. C. Certificate was cancelled, on a challenge against the validity of the order of cancellation on the ground that by virtue of section 12 of the Probation of Offenders Act, the proceedings in question could not have been taken,

Held: Section 12 of the Probation of Offenders Act, 1958 has no application to rule 154 of the Tamil Nadu Educational Rules. This Rule does not provide for any disqualification automatically resulting from the conviction. On the other hand, this Rule contemplates action being taken independently once a conviction had taken place. All that can be said is that the Rule takes note of the conviction of a teacher or headmaster, and that conviction constitutes an occasion and the basis for taking action under Rule 154. Consequently, having regard to the manner in which section 12 of the Probation of Offenders Act, 1958 has been interpreted by the Supreme Court in *Divisional Personnel Officer, Southern Railway* v.

*W. A. No. 358 of 1976. 8th *August*, 1980.

Chellappan, (1976) 1 S. C. R. 783 : (1976) 3 S. C. C. 190 : A. I. R. 1975 S. C 2216, it is not possible to accept the contention of the appellant that section 12 of the Probation of Offenders Act constitutes a bar to proceedings under Rule 154 of the Tamil Nadu Educational Rules.

[*Para.* 7.]

Case referred to :—

Divisional Personnel Officer, Southern Railway v. *Chellappan,* (1976) 1 S. C. R. 783 : (1976) 3 S. C. C 190 : (1976) 1 Lab. L. J 68 : (1975) Lab. I. C. 1598 : A. I. R. 1975 S. C. 2216.

Appeal under Clause 15, Letters Patent against the order of Mohan, J., in W. P. No. 2638 of 1976, dated 30th August, 1976.

K. Sengottian, for Appellant.

The Government Pleader, for Respondent.

The Order of the Court was made by

Ismail, CJ.—This is an appeal against the order of Mohan, J., dated 30th August, 1976, dismissing W P No. 2638 of 1976 filed by the appellant herein. While the appellant was the Headmaster of a school he was arrested for certain offences, including one under section 120-B, Indian Penal Code. Consequent on his arrest, he was suspended. On 12th September, 1967 he was convicted by the Sessions Judge, and on 11th July, 1970, based on his convition, he was dismissed. On 21st April, 1971, on appeal his conviction relating to the offence under section 120-B, Indian Penal Code, was confirmed. However, he was released under section 4 (1) of the Probation of Offenders Act, 1958. Consequent on the judgment of the appellate Court the appellant was also reinstated.

2. Thereafter action was taken under Rule 154 of the Tamil Nadu Educational Rules. A show cause notice was issued by the Director of School Education (respondent herein) to the appellant, drawing his attention to the fact of conviction and asking him to show cause why his T S. L. C. should not be cancelled. On 9th April, 1976, he submitted his reply. Not being satisfied with his reply, the impugned order of cancellation of the certificate came to be passed on 26th June, 1976. It was to quash that order the present writ petition was filed. The learned Judge having dismissed the writ petition, the present writ appeal has been filed.

3. The learned counsel for the appellant contends and that was the argument before the learned Judge also that by virtue of section 12 of the Probation of Offenders Act, 1958 (Central Act XX of 1958), the proceedings in question could not have been taken by the Director of School Education, in view of the appellant having been released under section 4 of the Probation of Offenders Act, 1958.

4. Section 12 of the Probation of Offenders Act, 1958, reads as follows :

> "Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:
>
> Provided that nothing in this section shall apply to a case who, after his release under section 4, is subsequently sentenced for the original offence".

5. The Supreme Court had occasion to consider the scope of this section in *Divisional Personnel Officer, Southern Railway* v. *Chellappan*[1]. In paragraph 11 of the judgment, the Supreme Court observed :

> "This brings us to the consideration of two inter-connected questions, namely, as to what is the effect of the order of the Magistrate releasing the accused on probation and the effect of section 12 of the Probation of Offenders Act. It was suggested by the respondent that if the Magistrate does not choose, after convicting the accused, to pass any sentences

1. (1976) 1 S. C. R. 783 : (1976) 3 S. C. C. 190 : (1976) 1 Lab. L. J. 68 : (1975) Lab. I. C. 1598; A IR. 1975 S. C. 2216.

on him, but releases him on probation, then the stigma of conviction is completely washed out and obliterated, and, therefore rule 14 (1) of the Rules of 1968 will not apply in terms. We are however unable to agree with this some-what broad proposition. A perusal of the provisions of the Probation of Offenders Act, 1958, clearly shows that the mere fact that the accused is released on probation does not obliterate the stigma of conviction".

After extracting the relevant portions of sections 3 and 4, section 9 (3) and (4) of the Act, Supreme Court proceeded to observe :

"These provisions would clearly show that an order of release on probation comes into existence only after the accused is found guilty and is convicted of the offence. Thus the conviction of the accused or the finding of the Court that he is guilty cannot be washed out at all, because that is the *sine qua non* for the order of release on probation of the offender. The order of release on probation is merely in substitution of the sentence to be imposed by the Court. This has been made permissible by the statute with a humanist point of view in order to reform youthful offenders and to prevent them from becoming hardened criminals. The provisions of section 9 (3) of the Act extracted above would clearly show that the control of the offender is retained by the criminal Court and where it is satisfied that the conditions of the bond have been broken by the offender, who has been released on probation, the Court can sentence the offender for the original offence. This clearly shows that the factum of guilt on the criminal charge is not swept away merely by the passing of the order releasing the offender on probation. Under sections 3, 4 or 6 of the Act, the stigma continues and finding of the misconduct resulting in conviction must be treated to be a conclusive proof. In these circumstances, therefore, we are unable to accept the argument of the respondents that the order of the Magistrate releasing the offender on probation obliterates the stigma of conviction".

After extracting section 12 of the Act, and the argument advanced with reference thereto, the Supreme Court observed :

"It was suggested that section 12 of the Act completely obliterates the effect of any conviction and wipes out the disqualification attached to a conviction of an offence under such law. This argument, in our opinion, is based on a gross misreading of the provisions of section 12 of the Act. The words 'attaching to a conviction of an offence under such law' refer to two contingencies : (i) that there must be a disqualification resulting from a conviction; and (*ii*) that such qualification must be provided by some law other than the Probation of Offenders Act".

6. It is against the background of this law laid down by the Supreme Court we have to consider the effect of the argument of the learned counsel for the appellant in the present case. In this case, as we already pointed out, action was taken under rule 154 of the Tamil Nadu Educational Rules. Rule 154 provided for the cancellation or suspension of a teacher's certificate or any grade, if the character and conduct of the teacher is shown to be bad. This Rule further provides :

"Such suspension or cancellation shall not be ordered except when the teacher or headmaster has been convicted in a Court, until the teacher or headmaster has been informed in writing of the charges against him, and full enquiry has been made either by the Chief Educational Officer or by the Director, or by any officer deputed by either of them for the purpose".

7. In our opinion, section 12 of the Probation of Offenders Act, 1958, has no application to this Rule. This rule does not provide for any disqualification automatically resulting from the conviction. On the other

hand, this Rule contemplates action being taken independently once a conviction had taken place. All that can be said is that the Rule takes note of the conviction of a teacher or headmaster, and that conviction constitutes an occasion and the basis for taking action under rule 154. Consequently, having regard to the manner in which section 12 of the Probation of Offenders Act, 1958, has been interpreted by the Supreme Court, it is not possible to accept the contention of the learned counsel for the appellant that section 12 of the Probation of Offenders Act constitutes a bar to proceedings under rule 154 of the Tamil Nadu Educational Rules.

8. Before the learned Judge another argument would appear to have been put forward, namely, that the charge levelled against the appellant in the show-cause notice was vague The learned Judge very rightly pointed out that such a case was not put forward at the earlier stage, but was put forward only in the writ petition, that even in the reply to the show-cause notice which the appellant gave, he did not put forward any case of vagueness of the charge and that the *explanation* showed that the appellant had clearly understood the charge. In view of this, the contention that the charge in the show-cause notice is vague was not repeated before us.

9. The result is that the appeal fails and is accordingly dismissed. There will be no order as to costs.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

R. S. Muthuswami Gounder ... *Appellant**

v.

A. Annamalai and others ... *Respondents*

(A) *Transfer of Property Act (IV of 1882), section 51—Suit for declaration and vacant possession of land — Allegation of trespass by defendant and putting up of superstructure —Nothing done by owner to stop it—Acquiescence by owner—Trespasser not liable to be evicted —Owner to be compensated.*

(B) *Civil Procedure Code (V of 1908), section 100 — Arguments whether to be confined only to substantial question of law framed — Substantial question of law not framed — Whether could be raised.*

Held : As per the decisions reported in *The Associated Cement Companies Limited* v. *L. S. Rama Krishna Gounder*, I.L.R. (1965) 1 Mad. 237 : 77 L. W. 629 and *S Palanivelu* v. *Varadammal*, (1978) 1 M.L.J. 212 : I. L. R (1978) 1 Mad. 206 : 90 L. W. 531 : A. I R. 1977 Mad. 342, a plaintiff who resides about a mile away from the suit property, would have come to know about the defendant putting up constructions on a major portion of the suit property if he had cared to find out and since he has not done so and kept quiet until the first defendant had completed his constructions which have been valued by the Commissioner at Rs. 15,000 and had sent the notice only about 7 or 8 months later after January, 1972, asserting, his right to the suit property, the principle of acquiescence has to be made applicable to the facts of the case and the plaintiff has to be given only a decree for compensation in respect of the property in lieu of the relief of recovery of vacant possession of the property. [*Para.* 16.]

*S. A. No. 427 of 1978. 15*th August*, 1980.

Cases referred to:—

Associated Cement Companies Ltd. v. *Ramakrishna Gounder*, I L R. (1965) 1 Mad 237 : 77 L. W. 629 : A. I. R. 1965 Mad. 318 ; *Palanivelu* v. *Varadammal*, (1978) 1 M. L. J. 212 : I. L. R. (1978) 1 Mad. 206 : 90 L. W. 531 : A. I. R. 1977 Mad. 342 ; *Mohindra and Mohindra Ltd.* v. *Union of India*, 1979 Tax. L. R. 2064 : (1979) 2 S C. C. 529 : (1979) 2 S. C R 1038 49 Comp Cases 419 : A. I R. 1979 S C. 798 ; *Cairncross* v. *Lorimer* 3 Law Times 130 ; *Duke of Leeds* v. *Azherst*, (1846) 78 B. B. 4 ; *Wilmott* v. *Barber*, (1880) 15 Ch. D. 96 ; *K. S. R. Ramanathan Chetty* v *Ranganathan Chetty*, (1917) I. L. R. 40 Mad. 1134 : 33 M. L J. 252 : 6 L. W 300 ; *Bakharia Dhuria* v. *Manak Gangaram*, A. I. R. 1954 Nag. 97 ; *Dr. Abdul Khadir* v *Miss Sheilla Myrtle James*, A. I. R 1957 Pat. 308 ; *Sarjug Devi* v. *Dulbin Kishori Kuer*, A. I. R. 1960 Pat. 474 ; *Bodi Reddy* v. *Appu Goundan*, (1970) 2 M. L. J. 577.

Appeal against the decree of the District Court, Coimbatore (East) at Erode in Appeal Suit No. 120 of 1976 preferred against the decree of the Court of the Subordinate Judge, Erode in Original Suit No. 187 of 1972.

P. S. Srisailam, for Appellant.

N. Sivamani, for Respondents.

The Court made the following

ORDER.—The first defendant R. S. Muthuswami Gounder, who has lost in both the Courts, below, is appellant in this second appeal. The plaintiff A. Annamalai filed the suit for a declaration of his title to the suit property and for recovering vacant possession of the same and also for a mandatory injunction directing the demolition of the superstructure put up on the property by the first defendant and for damages of Rs. 200 for use and occupation of the property by the first defendant at Rs. 100 per mensem from the middle of January, 1972.

2. The suit property is a vacant site measuring 42 feet east to west and 136 feet north to south on the west, and 126 feet north to south on the east, in T. S No. 907/2 in Erode Municipal Town, stated to be in three plots. According to the plaint, T. S. No. 907/2 belonged to defendants 5 to 7 and some other co-sharers. Defendants 5 to 7 got for their share in the partition effected under Exhibit A-1, dated 6th May, 1967 the portion marked A, B, C., D in the plaint plan measuring 270½ feet east to west on the south 225½ feet east to west on the north, 162½ feet north to south on the west and 115½ feet north to south on the east. Those defendants 5 to 7 sold under Exhibits A-3, A-4 and A-5 all dated 19th July, 1967 three plots marked 1 to 3 to the plaintiff, the third defendant and the fourth defendant respectively. Defendants 5 to 7 sold the plot marked No. 4 in the plaint plan to the tenth defendant under Exhibit A-6, dated 20th November, 1967. They sold the plot marked No. 5 in the plaint plan to the second defendant under Exhibit A-7 dated 10th March, 1969, and on the same day they sold the plot marked No. 6 in the plaint plan to the first defendant under Exhibit A-9, and the plot marked No. 7 in the plaint plan to defendants 1 and 2 under Exhibit A-9. Defendants 1 and 2 entered into an exchange transaction under Exhibit A-10, dated 17th August, 1970, whereby the first defendant became entitled to plot marked No. 7 in the plaint plan situate immediately east of the suit property marked No 3 in the plaint plan. According to the plaint, the plaintiff was not aware until January, 1972, of any construction having been put up on the suit property. In January, 1972, when the plaintiff measured his property he discovered that the first defendant had encroached upon a portion of the suit property. The first defendant has put up a tiled roofing for putting up looms, a small room with *Sara palagai* facing the 40 feet east to west road and a small tiled house with 2 or 3 rooms for his residence behind that room. After the first defendant declined to comply with the plaintiff's request to remove the encroachment, the plaintiff sent the notice, Exhibit A-11, dated 2nd February, 1972, for which the first defendant sent the reply notice, Exhibit A-12, dated 15th March,

1972 with false allegations and exaggerated value of the constructions put up by him on the suit property. The plaintiff filed the suit in those circumstances for the aforesaid reliefs.

3. The first defendant alone contested the suit. His defence was that he is a *bona fide* purchaser for value of the property lying east of the suit property and he raised the construction on the suit property first in 1970. The plaintiff did not raise any objection until February, 1972. The first defendant has put up constructions at a cost of Rs. 25,000 under the *bona fide* belief that the suit property belongs to him. Nearly 2½ years have elapsed after the construction of the buildings by the first defendant and no objection was raised by the plaintiff. The conduct of the plaintiff would clearly show that he has acquiesced in the acts of the first defendant. In those circumstances, though there may be a mistake on the part of the first defendant, the plaintiff is not justified in asking for delivery of vacant possession of the land and he would be entitled to receive only compensation at the prevailing market rate.

4. The learned Principal Subordinate Judge, Erode, who tried the suit, framed five issues and an additional issue, and appointed a Commissioner who has filed his report and plan, Exhibits C-1 and C-2. The Commissioner has located the suit site as E-J-K-L-in his plan, Exhibit C-2 He found the portion marked F-G. I-J in Exhibit C-2 to be in the enjoyment of the first defendant and the superstructure marked F-G-S-S in his plan having been constructed on a portion of the suit plot marked E-J-K-L by him. The portion marked green in his plaint is a tiled shed while the portion marked yellow in his plaint is the first defendant's tiled building. The roof of the tiled sheds is of double Calicut tiles and those sheds are electrified, though according to the Commissioner, the electrification is a loose one. In the tiled building there is one store-room, one hall, one room a kitchen and a shop facing the road. There is also an open bath-room in the south-eastern corner of the tiled building with a *thinnai* or pial in front of that building.. The tiled building is elevated from the ground level by 8 feet and contains two layers of roof, the top layer being of Calicut tiles and the lower layer being of flat tiles. This tiled building has been electrified and the electrification, according to the Commissioner, is a permanent one. The Commissioner estimated the value of the buildings put up the first defendant at Rs. 15,000. It may be stated that another shed marked green in Exhibit C-2 appears to have been put up by the first defendant partly on the suit property and partly on his own property lying immediately on the east.

5. Both the learned Principal Subordinate Judge who tried the suit and the learned District Judge Coimbatore East at Erode, who heard the appeal filed by the first defendant, found that the plaintiff has title to the suit property and that the first defendant has encroached upon the plaintiff's property. The learned Principal Subordinate Judge decreed the suit for declaration and delivery of vacant possession and also for mesne profits from the middle of January, 1972, till delivery of vacant possession after removal of the superstructure put up by the first defendant on the suit property, directing the mesne profits to be determined in separate proceedings under Order 20, rule 12 of the Code of Civil Procedure, with costs to be paid by the first defendant. The learned District Judge confirmed the trial Court's decree and dismissed the appeal with costs.

6. The findings of the Courts below on the question of title and the encroachment on the plaintiff's property by the first defendant are questions of fact and were rightly not canvassed by the learned counsel for the first defendant-appellant before me. The argument before me was confined to the question whether the plaintiff is entitled to recover possession of the suit property after demolition of the superstructures put up by the first defendant on the suit property, as decreed by the Courts below or only to compensation on the ground of

acquiescence. The learned counsel for both the plaintiff and the first defendant invited my attention to the evidence of defendants 1 and 2 examined as D. Ws. 1 and 2 respectively, and of the plaintiff examined as P. W. 1, in this connection. In the written statement itself the first defendant has stated that he started the construction after 17th August, 1970, and in his evidence he has stated that he had taken about nine months to complete the construction, which would take us to May, 1971. D W. 2 has stated that the first defendant has completed the construction in 1970 and he has not been cross-examined on that portion of his evidence. The evidence of P. W. 1 is that he came to know in January, 1972, that constructions had been put up on the suit property. He has not stated in his evidence that the construction was not put up in 1970. The evidence on the whole established that the first defendant had started construction of the buildings after the date of the exchange deed, Exhibit A-10 dated 17th August, 1973, between himself and the second defendant, that it was completed in about May, 1971, and that the plaintiff, who lives in Erode itself about one mile away from the suit property, found in January, 1972, that the first defendant had completed the constructions on the suit property. In this state of the evidence Mr. P. S. Srisailam, the learned counsel for the appellant-first defendant, invited my attention to the decision of a Division Bench of this Court in *Associated Cement Companies Limited* v. *Ramakrishna Gounder*[1] and to my own decision in *Palanivelu* v. *Varadammal*[2], which will be referred to after referring to the decisions to which Mr. N. Sivamani, the learned counsel for the plaintiff, invited my attention.

7. Before referring to the decisions relied upon by Mr. N Sivamani, it is necessary to state that he made a faint attempt in the course of his arguments that the arguments in the second appeal should be confined to the only substantial question of law framed by N. S. Ramaswami, J., while the learned Judge admitted this second appeal on 23rd February, 1978. That question is this :

> "Whether the courts below have failed to localise the various plots according to the correct measurements and also failed to localise the 20 ft. road on the western side, leading to erroneous conclusions that the first defendant has encroached upon the plaintiff's plot".

It is unfortunate that the substantial question of law framed in the Memorandum of Grounds of second appeal had not been drawn to the notice of the learned Judge. That question is this :

> "Whether the plaintiff, who has prayed for mandatory injunction as incidental to the relief of recovery of possession, is entitled to delivery of possession depriving the plaintiff (appears to be a mistake for the first defendant) of the superstructure constructed by him, instead of a compensation amount".

Clause (1) of section 100 of the Code of Civil Procedure lays down that

> "Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law."

Clause (*b*) of that section lays down that

> "The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such a question".

The proviso to clause (5) reads thus :

> "Provided that nothing in this sub-section shall be deemed to take away or abridge

1. I. L. R. (1965) 1 Mad. 237 : 77 L. W. 629 : A. I. R. 1965 Mad. 318.

2. (1978) 1 M. L. J. 212: I. L. R. (1978) 1 Mad. 206: 90 L. W. 531: A. I. R. 1977 Mad. 342.

the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question".

In this connection, Mr. N. Sivamani invited my attention to the decision in *Mahindra and Mahindra Limited* v. *Union of India and others*[1] where at pages 442 and 443 their Lordships of the Supreme Court have observed :

"We have no doubt that section 55 is an instance of legislation by incorporation and not legislation by reference. Section 55 provides for an appeal to this Court on 'one or more of the grounds specified in section 100'. It is obvious that the legislature did not want to confer an unlimited right of appeal, but wanted to restrict it and turning to section 100, it found that the grounds there set out were appropriate for restricting the right of appeal and hence it incorporated them in section 55 The right of appeal was clearly intended to be limited to the grounds set out in the then existing section 100. Those were the grounds which were before the legislature and to which the legislature could have applied its mind and it is reasonable to assume that it was with reference to those specific and known grounds that the legislature intended to restrict the right of appeal. The legislature could never have intended to limit the right of appeal to any ground or grounds which might from time to time find place in section 100 without knowing what those grounds were. The grounds specified in section 100 might be changed from time to time having regard to the legislative policy relating to second appeals and it is difficult to see any valid reason why the legislature should have thought it necessary that these changes should also be reflected in section 55 which deals with the right of appeal in a totally different context. We fail to appreciate what relevance the legislative policy in regard to second appeals has to the right of appeal under section 55 so that section 55 should be inseparably linked or yoked to section 100 and whatever changes take place in section 100 must be automatically read into section 55. It must be remembered that the Act is a self-contained code dealing with monopolies and restrictive trade practices and it is not possible to believe that the legislature could have made the right of appeal under such a code dependent on the vicissitudes through which a section in another statute might pass from time to time. The scope and ambit of the appeal could not have been intended to fluctuate or vary with every change in the grounds set out in section 100. Apart from the absence of any rational justification for doing so, such an indissoluble linking of section 55 with section 100 could conceivably lead to a rather absurd and startling result; Take for example a situation where section 100 might be repealed altogether by the legislature—a situation which cannot be regarded as wholly unthinkable. If the construction contended for on behalf of the respondents were accepted, section 55 would in such a case be reduced to futility and the right of appeal would be wholly gone, because then there would be no grounds on which an appeal could lie. Could such a consequence ever have been contemplated by the legislature? The legislature clearly intended that there should be a right of appeal, though on limited grounds, and it would be absurd to place on the language of section 55 an interpretation which might, in a given situation, result in denial of the right of appeal altogether and thus defeat the plain object and purpose of the section. We must, therefore, hold that on a proper interpretation the grounds specified in the then existing section 100 were incorporated in section 55 and the substitution of the new section 100 did not affect or restrict the grounds as incorporated and since the present appeal admittedly raises questions of law, it is clearly maintainable under section 55."

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1. (1979) Tax. L.R. 2064 : (1979) 2 S. C. C. 529: (1979) 2 S. C. R. 1038 : A. I. R. 1979 S. C. 798 : 49 Com. Cas. 419.

But it has to be noted that Mr. N. Sivamani conceded that when section 55 of the Monopolies and Restrictive Trade Practices Act, 1969, came up for consideration before their Lordships of the Supreme Court the present proviso to clause (5) of section 100 of the Civil Procedure Code, was not there in the Code. I am satisfied that the question whether the plaintiff is entitled to delivery of vacant possession of the suit property after removal of the superstructures put up on it by the first defendant by a mandatory injunction or in equity he would be entitled only to compensation for the suit property in lieu of his right to recover possession of the property, is a substantial question of law and that the learned counsel for the plaintiff and the first defendant should be heard on that question, and that it is not possible, under the circumstances of the case, to confine the arguments to the substantial question of law framed by N. S. Ramaswami, J., while admitting the second appeal.

8. Mr. N. Sivamani invited my attention to certain passages occurring at pages 1050, 1051, 1053 and 1054 of Volume II of 'Sarkar on Evidence', Eleventh Edition. At page 1050 the observations of Lord Campbell in *Cairncross* v. *Lorimer*[1], are extracted, and they are:

> "Generally speaking if a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license".

At page 1051 the observation of Cottenham, L. C. in *Duke of Leeds* v. *Azherst*[2], is extracted and it is this:

> "If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence".

The following passages also are found at page 1051:

> "In order to constitute acquiescence not only (1) full knowledge of one's right is required, but (2) there must be some lying by him to the detriment of the other side. For it is elementary that there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement......... ... Acquiescence implies that a person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the *bona fide* belief that he was acting within his rights. The absence of either of those elements makes the doctrine inapplicable. Acquiescence does not simply mean standing by. It does not mean quiescence only. It means assent after the party has come to know of his right . . . . There is a distinction between acquiescence occurring while the act is in progress, and acquiescence taking place after the act has been completed. In the former case the acquiescence is acquiesence under such circumstances as that assent may be reasonably inferred from it In the latter case when the act is completed without any knowledge or without any assent of the person whose right is infringed, the matter is to be considered on very different legal considerations."

At page 1053 we find the following passage:

> "It is of the essence of acquiescence that the party acquiescing should be aware of and by words and conduct should represent that he assents to what is violation of his rights and that the person to whom such representation is made should

1. 3 Law Times 130.
2. (1846) 78 E. R. 47.

be ignorant of the other party's rights and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party".

We also find the following passage at page 1053:

"The laws as to equitable estoppel by acquiescence has been very clearly stated by Fry, J., in *Wilmott* v. *Barber*[1] :

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights What, then, are the elements or requisites necessary to constitute fraud of that description?

In the first place, the plaintiff (*i. e.*, the party pleading acquiescence) must have made a mistake as to his legal rights;

Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief;

Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. It he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is found upon conduct with a knowledge of your legal rights;

Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights;

Lastly, the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but in my judgment nothing short of this will do."

The learned commentator has added at page 1053 that in order that the rule may apply all the above conditions must exist.

9. Mr. N. Sivamani invited my attention to the following passage occurring at page 1054 :

"Mere non-interference is not enough. Acquiescence with full notice in act prejudicial to one's self so as to induce reasonable belief of his consent, followed by consequent alteration of other's position is necessary ... . Where knowledge on the part of the person to be estopped is not proved, the doctrine of acquiescence does not apply . . . .".

He also invited my attention to the following passage occurring at page 4984 of Field's 'Law of Evidence', 10th Edition, 1972 :

"Acquiescence does not simply mean standing by. It does not mean acquiescence only. It means assent, after the party has come to know of his right".

The learned counsel argued that knowledge on the part of the person to be estopped is necessary and that he should have come to know about the encroachment by way of construction while the construction was in progress for the principle of acquiescence being applied against him, and that there would be no acquiescence if he came to know of the construction after the completion of the construction.

10. The first of the decisions relied upon by Mr. N. Sivamani is of a Full Bench of

1. (1880) 15 Ch. D. 96.

this Court in *K. S. R. Ramanathan Chetty and three others* v. *Ranganathan Chetty and two others*[1]. In that case the plaintiff and the defendant exchanged adjacent plots of land each worth more than Rs. 100 by means of an unregistered deed dated 4th March, 1908, both believing that they had effected a valid transfer. Possession had been taken by each party and the defendant began to erect a very costly building placing a wall thereof in the land he had acquired by the exchange. While the building was in progress, the plaintiff demanded and obtained a sum of Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent that the defendant's. After the completion of the buildings the plaintiff brought the suit in 1911 for recovery of his plot after removal of the defendant's building which had been put upon it. The defendant pleaded *inter alia* that he had acquired a valid title to the plot, that the plaintiff was estopped by his conduct from recovering the plot and that if the plaintiff was to get a decree he must pay compensation as a condition for recovery. The majority held, Abdur Rahim, J., dissenting, that the plaintiff was not estopped but was entitled to recover his plot owing to the absence of a registered deed of exchange as required by sections 54 and 118 of the Transfer of Property Act and that he must pay sufficient compensation before recovery under section 51 of the Transfer of Property Act. In my opinion this decision will not apply to the facts of the present case where there had been no invalid exchange between the plaintiff and the first defendant, whereas in that case the plaintiff relied upon an invalid exchange deed and proceeded to construction on the plot under the impression that the plot exclusively belonged to him.

11. The next decision relied upon by Mr. N. Sivamani is of Kaushalendra Rao, J., in *Bakharia Dhuria* v. *Manak Gangaram*[2], where the learned Judge has held that acquiescence is a matter of legal inference from the facts established in a case and mere inactivity of the person concerned for a particular number of years apart from anything else in the case does not necessarily lead to the inference of aquiescence and the question of acquiescence cannot be reduced to a rule of thumb.

12. The third decision relied upon by Mr. N. Sivamani is of a Bench of the Patna High Court in *Dr. Abdul Khair* v. *Miss Sheilla Myrtle James and another*[1]. The learned counsel invited my attention to headnote (*b*) which is this :

"Generally speaking if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence. An estoppel does not itself give a cause of action; it prevents a person from denying a certain state of affairs . . . .The plaintiff and defendants were neighbouring plot owners. In constructing their house the defendants made encroachment on plaintiff's land. None of the parties knew their respective rights in regard to the encroached land, and both were labouring under some sort of mistake about their respective right in the said land. Only when the defendants' constrution had progressed for several months, and when a boundary dispute cropped up between the parties, and when the plaintiff measured the land that he learnt that the portion on which the defendants were constructing the building belonged to him, and immediately thereafter he brought a suit for possession".

1. (1917) 33 M.L. J. 252 : 6 L. W. 300 : I. L. R. 40 Mad 1134.
2. A. I. R. 1954 Nagpur 97.
3. A.I.R. 1957 Patna 308.

n that case it has been held that no building quity has arisen in favour of the defendants, nor any equitable rights have sprung up in their favour, which can prevent the plaintiff, in the circumstances of the case, to claim possession by demolition of the building on the encroached portion of his land.

13. The fourth decision relied upon by Mr. N Sivamani is of Kanhaiya Singh, J., in *Sarjug Devi and others* v. *Dulbin Kishori Kuer and others*[1]. The learned counsel invited my attention to headnote (*d*) which reads thus :

"Where a person (who purchases land from person having no title to it) in possession of land, not in mistaken belief of his rights but in assertion of his rights which he correctly believed to be his, builds structures on the land and the person who is entitled to possession knows of this, the latter is not estopped by acquiescence from bringing a suit for possession when the person in possession, had he exercised care and diligence expected of a man of ordinary prudence, would have easily discovered where the true title lay".

The next decision relied upon by Mr. N. Sivamani is of Ismail, J., as he then was, in *Bodi Reddy* v. *Appu Goundan*[2], where the learned Judge had dealt with two appeals. In one case the construction was after the Revenue Authorities came and measured the property of the parties and made known the limits of their respective properties. In those circumstances it could not be held that the defendant put up the construction on the plaintiff's property under the *bona fide* belief that he was doing so on his own property, and the learned Judge has held that the principle of acquiescence is not applicable to the facts of that case. In the other appeal the construction by the Panchayat was in the year 1957 and the suit for recovering vacant possession of the land was filed in 1962. The Panchayat had constructed a public latrine on a portion of the plaintiff's property and consequently the other portion of the plaintiff's property, which was a house site, became absolutely useless. In those circumstances the learned Judge held that the principle could not be made applicable to the facts of that case. This decision, in my opinion, would not apply to the facts of the present case.

1. A. I. R. 1960 Pat. 474.
2. (1970) 2 M. L. J. 577.

14. The last decision relied upon by Mr. N. Sivamani is of V. Ramaswami, J., (*Balaiyah Nadar and others* v. *Dhanabackiathammal and another*)[1] where the learned Judge has observed that merely because the plaintiffs asked for a mandatory injunction and were also guilty of laches in not filing the suit or allowing the defendants to put up the superstructure, the plaintiffs could not be said to have disentitled themselves from getting possession of the property, and that in view of the findings of the Courts below that the plaintiffs had not objected to the construction, that fact may entitle the defendants to remove the superstructure, but the defendants are not entitled to any right of purchase of the suit land on the ground that the plaintiffs were guilty of laches in not objecting to the construction even at the time of the construction. The learned Judge has further observed that so long as the suit is not barred by limitation and the defendants have not prescribed title to the property, the plaintiff's right is not taken away and that a similar view was also taken by this Court after an elaborate consideration of the law on the point in the decision in *Bodi Reddy* v. *Appu Goundan*[2], already referred to.

15. In the decision of a Bench of this Court in *The Associated Cement Companies Limited* v. *L. S. Ramakrishna Gowder*[3], referred to above, a decision of Veeraswami, J., as he then was, came up for consideration in Letters Patent Appeal No. 12 of 1963. The learned single Judge, while affirming the

1. S. A. No. 729 of 1971.
2. (1970) 2 M. L. J. 577.
3. I. L. R. (1965) 1 Mad 237: 77 L. W. 629: A. I. R. 1965 Mad. 318.

title of the appellant to 79 cents of land, held that in the circumstances it would be unjust to pass a decree for possession of the property, and he accepted the finding of the lower appellate Court that the appellants could, if they had cared, have found out in time when the respondent was trying to encroach upon their property and when they had permitted the latter to complete his construction, it was evident that they were acquiescing in the act of the respondent, and he, therefore, considered that this was not a case for directing delivery of possession but it was a case where the plaintiffs should be compensated in money in substitution of the relief of recovery of possession of the property. In view of the fact that a Bench of this Court has affirmed the decision of Veeraswami, J., as he then was in the said second appeal that the appellants could, if they had cared, have found out in time that the respondent was trying to encroach upon their property and when they permitted the latter to complete his construction it was evident that they were acquisescing in the act of the respondent and they were, therefore, not entitled to delivery of possession but were entitled only to compensation in lieu of possession of the property, it is not possible to accept the view of either the Division Bench of the Patna High Court in *Dr. Abdul Khair* v. *Miss Sheilla Myrtle James and another*[1] or of the single Judge of that Court in *Sarjug Devi and others* v. *Dulhin Kishori Kuer and others*[2] or of Ismail, J., as he then was in *Bodi Reddy* v. *Appu Goundhan*[3] or of V. Ramaswami, J, in the aforesaid decision in *Balaiyah Nadar and others* v. *Dhanabackiothammal and others*[4].

16. I had occasion to consider the question of acquiescence in *S. Palanivelu* v. *K. Varadammal*[5], mentioned above. There was evidence in that case to show cause that the defendant put up a portion of the main building and a major portion of the well and had done other acts in the trespassed portion of the suit property under the *bona fide* belief that the portion of the property was part of R. S. No. 3173 / 12, of which he was an allottee under Nammalwarpet Co-operative Housing Site Society. There I have extracted the observation of the Division Bench in the aforesaid decision in *The Associated Cement Companies Limited* v. *L. S. Ramakrishna Gowder*[1] namely:

> "The respondens did not perhaps know at that time that he was trespassing upon Government property. There was every reason for it. Nearly five years after the buildings were put up, the appellant sent a notice to the respondent complaining that in putting up the buildings the latter had trespassed into a portion of the property leased out to them by the Government. The respondent contested the title of the appellant to that extent of property. The former then instituted a suit out of which this appeal arises in 1958 for recovery of possession of 79 cents of land which had been occupied by the respondent and for a mandatory injunction directing him to remove the superstructure put up thereon. Both the Courts below found that the appellant had title to the property and they accordingly passed a decree for possession. The learned appellate Judge, however, realised that the appellant could have discovered the encroachment even at the time of construction of the building by the respondent. But be was of the view that having regard to the nature of the land and the circumstances under which the encroachment was noticed, the appellant could not be held to have acquiesced in the action of the lower defendant in putting up the buildings. One can easily see from the judgment of the lower appellate Court that but for the indifferent attitude adopted by the appellants the respondents could not have been encouraged to put up the buildings.
>
> It is not pretended that the appellant was not aware of the buildings coming up. Notwithstanding the view expressed by the appellate Judge, one can easily see that there must have been some kind of acquiescence

1. A. I. R. 1957 Pat. 308.
2. A. I. R. 1960 Pat. 474.
3. (1970) 2 M. L. J. 577.
4. S. A. No. 729 of 1971.
5. (1978) 1 M. L. J. 212 : I. L. R. (1978) 1 Mad. 206 : 90 L. W. 531 : A. I. R. 1977 Mad. 342.

1. I. L. R. (1965) 1 Mad. 237 : 77 L. W. 629 ; A.I.R. 1965 Mad. 318.

on the part of the appellant while the respondent was putting up his buildings. The respondent feeling aggrieved by the judgment of the lower appellate Court filed second appeal to this Court. Veeraswami, J., while affirming the title of the appellant to 79 cents of land held that in the circumstances it would be unjust to pass a decree for possession of the property. The learned Judge accepted the finding of the lower Court that the appellants could, if they had cared, have found out in time that the respondent was trying to encroach upon their property and when they permitted the latter to complete the construction, it was evident that they were acquiescing in the act of the respondent. He therefore, considered that this was not a case for directing delivery of possession. Inasmuch as there was a prayer in the plaint for the grant of equitable relief by way of mandatory injunction, the learned Judge held that it would be competent for the Court to substitute in the place of the relief sought, a decree for compensation.

It will be clear from what we have stated above, that although an owner of property will have undoubted right to recover possession of it from a trespasser albeit that the latter had put up a construction upon it, an exception does exist to such a rule when the owner is precluded by any conduct on his part from claiming possession. That is not really denying the owner his right to recover possession from the trespasser ; but a rule of estoppel which prevents the owner from claiming the property to be his so far as the other side is concerned".

In the case which came up for consideration before me, the respondent-plaintiff had not done anything when the appellant-defendant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property and it was found that the appellant-defendant could not have done those things in a hurry and they must have taken several months for the appellant to complete the things which he had done on the property. The plaintiff-respondent had not disclosed those things in the plaint and had not prayed for a mandatory injunction for the removal of the structures put up by the defendant on the trespassed portion of the property. In those circumstances I held that the Court would be justified in inferring acquiecence on the part of the respondent and considered that it was not a case for directing delivery of possession of the trespassed portion but it was a case where the respondent-plaintiff had to be compensated in money for the value of the trespassed portion, and I called for a finding from the lower appellate Court as regards 'the market value of the trespassed portion. I am bound by the decision of the Division Bench of this Court rendered in the aforesaid *The Associated Cement Companies. Limited* v. *L. S. Ramakrishna Gowder*[1] and following that decision, and my own view expressed in *S. Palanivelu* v. *K. Veradammal*[2] I hold that the plaintiff, who resides about a mile away from the suit property, would have come to know about the defendant putting up constructions on a major potion of the suit property if he had cared to find out and since he has not done so and kept quiet until the first defendant had completed his constructions which have been valued by the Commissioner at Rs. 15,000 and had sent the notice only about 7 Or 8 months later after January, 1972, asserting his right to the suit property, I am of the opinion that the principle of acquiescence has to be made applicable to the facts of the present case and that the plaintiff has to be given only a decree for compensation in respect of the property, namely the market value of the suit property in lieu of the relief of recovery of vacant possession of the property. For want of evidence, a finding has to be called for from the lower appellate Court regarding the market value of the suit property as on the date of the suit. The lower appellate Court will submit its finding within two months from the date of receipt of the records. The parties are at liberty to adduce fresh evidence regarding the market value of the suit property. They will have two weeks' time to file their objections after the finding is received in this Court.

R. S. —— *Finding called for.*

1. I. L. R. (1965) 1 Mad. 237 : 77 L. W. 629: A. I. R. 1965 Mad. 318.
2. (1978) 1 M. L. J. 212 ; 90 L. W. 531.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*M M. Ismail, CJ. and M. A. Satha Sayeed, J.*

M. Vedachala Pillai and others ... *Petitioners**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Revenue Department, Madras-9 and others ... *Respondents.*

Tamil Nadu Hereditary Village Offices Act (III of 1895)—Sup eme Court decision in 1960 holding section 6 (1) of the Act to be d'scrimanatory and repugnant to Article 16 (2) of the Constitution — Act repealed in 1968 — Rules promulgated under proviso to Article 309 of the Constitution — Petitioners appointed village officers prior to 6th December, 1960—Petitioners required to retire under rule 4 (1) on their attaining the age of 60 – Validity of the order challenged.

The Supreme Court had held in 1960 that section 6 (1) of the Tamil Nadu Hereditary Village Offices Act, 1895, embodied a principle of discrimination on the ground of descent only thereby violating Article 16 (2) of the Constitution, a decision equally applicable to appointments under section 10 The Act was repealed in 1968, but section 2 (1) of the repealing Act provided that every holder of a village office under the repealed Act shall nevertheless continue to hold office subject to such rules as may be framed under the proviso to Article 309 of the Constitution. Subsequently, the Tamil Nadu Village Officers (Appointed under Board's Standing Orders) Service Rules, 1968 were promulgated and brought into force by G O. Ms. No. 2261, Revenue, dated 9th October, 1978. Rule 1 (2) of the Rules stated that the Rules would apply to all village officers holding the posts of village headman or additional village headman, village karnam or additional village karnam, Talayari, Vetti or Nirganti, permanently or temporarily on 16th December, 1970, provided that at the time of their appointment they were qualified under the B. S. O. applicable to them and their appointments had been made by the Authority competent under the Standing Orders. Rule 4 (1) provided *inter alia* that village officers on attaining the age of 60 years shall retire and shall not be retained in service.

In the instant cases, the petitioners were appointed as village officers under the provisions of Madras Act III of 1895, prior to the decision of the Supreme Court dated 6th December, 1960. The petitioners were required to retire on their attaining the age of 60 years under rule 4 (1). The petitioners challenged the validity of the order.

Held: Sub-rule (2) of rule 1 of the Rules expressly states that the Rules will apply to village officers, who at the time of their appointment, were qualified under the Board's Standing Orders applicable to them and their appointment had been made by authority competent under the Board's Standing Orders. In respect of these petitioners who were appointed under the provisions of Madras Act III of 1895 before 6th December, 1960, there was no question of their being qualified to be appointed to the Village Office under the Board's Standing Orders applicable to them, and their qualifications and appointments rested solely on the provisions contained in sub-rule (2) of rule 1 of the Rules. If they do not answer the description contained in sub-rule (2) of Rule 1 of the rules. the Rules are not applicable to them and therefore they cannot be required to retire under rule 4 (1) of the Rules. [*Para.* 7.]

Case referred to :—

Gazula Dasaratha Rama Rao v. *State of A. P.*, (1961) 1 M. L. J (S. C) 63: (1961) 1 An W. R. (S. C.) 63: (1961) 1 S C. J. 310 : (196) 2 S. C. R. 931 ; A. I. R. 1961 S. C. 564.

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*W. P. Nos. 4984 of 1978 and 221, 224, 225 etc. of 1980. 18th *August*, 1980.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue Writs of Declaration, declaring that the Tamil Nadu Village Officers (appointed under Board's Standing Orders) Service Rules, 1978 are illegal, *ultra vires* of the Constitution and inapplicable to the petitioner in each of the petitions, etc.

G. Ramaswamy for N Thyagarajan, R. Mahesh, A. Thirumurthy, N. Ganapathy, P. Ramaswamy, K. Alagumalai, R. Gandhi, G. Ravishanker, J. Kanakaraj, Raj and Raj, R. Balasubramaniam, P. D. Dinakaran, B. Lakshminarayana Reddy, K Shanmugham, John Arthur, K. Doraiswamy, R. M. Krishnaraju, T Somasundaram, V. Radhakrishnan, V. Subramanyam, K. V. Venkatapathy, R Muthukumaraswamy, A. R. Lakshmanan, V. M. Lenin, R. Nadanasabhapathy, R.G. Rajan, G Shanmugham, K. R. Thiagarajan, P. Krishnamoorthy, Pathy and Sundaram, Anand Rao, K. M. Santhanagopalan, R.P. Kabilam, K. Venkatasubbaraju, V. C. Palaniswamy, S. A Kareem, B. Ramamurthy, V. Ramajagadeesan, M. N. Padmanabhan, R Shanmugham and *S. Sivasubramaniam*, for Petitioners.

The Government Pleader, for Respondents.

The Order of the Court was made by

Ismail, CJ.—This batch of writ petitions raises a common question.

2. In the Presidency of Madras there were two enactments, the Madras Proprietary Estates Village Service Act (II of 1894) and the Madras Hereditary Village Offices Act (III of 1895) in force Section 6 of the latter Act dealt with the re-grouping of villages or division of villages and the appointment of officers to such re-grouped or divided villages. The basic principle under the Act was to recognise the hereditary right to the offices enumerated in section 3 (1) of the Act Consistent with that basic principle section 6 (1) of the Act provided that in choosing persons to fill up such offices the Collector shall select persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. Section 10 of the Act dealt with the succession to the offices and provided that, when a vacancy occurred in any of the village offices forming class (1) in section 3, the Collector shall fill up the vacancy in accordance with the provisions of the succeeding sub-sections and that succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaries in southern India. Sub-section (1) of section 10 enumerated certain disqualifications for such persons. Sub-section (3) stated that, where the next heir was not qualified under sub-section (1), the Collector shall appoint the person next in order of succession who was so qualified, and, in the absence of any such person in the line of succession, may appoint any person duly qualified under sub-section (1).

3. The validity of section 6 (1) of the Act was the subject-matter of consideration by the Supreme Court in *Gazula Dasaratha Rama Rao* v *State of Andhra Pradesh*[1]. The Supreme Court held :

> "There can be no doubt that section 6 (1) of the Act does embody a principle of discrimination of the ground of descent only. It says that in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished. This, in our opinion, is discrimination on the ground of descent only and is in contravention of Article 16 (2) of the Constitution".

4. Though the Supreme Court only dealt with section 6 (1) of the Act, it is beyond dispute that the decision of the Supreme Court was also applicable to the appointment made under section 10 of the Act, because the appointment under section 10

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1. (1961) 1 M L J. (S. C.) 63 (1961) 1 An. W. R. (S. C.) 63 : (1961) 1 S. C J. 310 : (1961) 2 S. C. R. 931 ; A. I. R. 1961 S. C. 564.

was made on the ground of descent alone. In view of this only the Madras Proprietary Estates Village Service and the Madras Hereditary Village Offices (Repeal) Act, 1968 was passed and the same received the assent of the Governor on the 8th October, 1968, and was published in the Fort St. George Gazette on the 16th October, 1968. Section 2 (1) of this Act repealed the two enactments referred to above namely, the Madras Proprietary Estates Village Service Act, 1894 (Madras Act II of 1894) and the Madras Hereditary Village Offices Act, 1895, (Madras Act III of 1895), subject to the provisions of sub-section (3). Sub-section (3) of section 2 provided :-

> "Every holder of a village office, appointed under the Acts repealed by sub-section (1), shall, notwithstanding the repeal of the said Acts, continue to hold office subject to such rules as may be made under the proviso to Article 309 of the Constitution."

Subsequently in order to give effect to the judgment of the Supreme Court as well as to implement the above statute, a number of rules were promulgated by the Government under the proviso to Article 309 of the Constitution of India, and, for the purpose of these cases, it is necessary to refer only to two sets of rules, namely, the Tamil Nadu Village Officers (Appointed under Board's Standing Orders) Service Rules, 1975, and the Tamil Nadu Village Officers (Appointed under Board's Standing Orders) Service Rules, 1978. The 1975 Rules which were promulgated by G. O. Ms. No 1140, Revenue, Dated 17th May, 1975, were not brought into force, but were kept in abeyance. The 1978 Rules were brought into force by G. O Ms. No. 2261, Revenue, dated 9th October, 1978, superseding the 1975 Rules. In the present case we are concerned only with the 1978 Rules (hereinafter called the Rules).

5. As we pointed out already, these Rules were called the Tamil Nadu Village Officers (Appointed under Board's Standing Orders) Service Rules, 1978, and were promulgated under the proviso to Article 309 of the Constitution of India. Sub-rule (2) of rule 1 stated that the "Rules" shall apply to all village officers holding the posts of Village Headman or Additional Village Headman, Village Karnam or Additional Village Karnam Talayari, Vetti, or Nirgati, either permanently or temporarily on the 16th December, 1970, provided that, at the time of their appointment they were qualified under the Board's Standing Orders applicable to them and their appointments had been made by the authority competent under the Board's Standing Orders. Rule 4 of these Rules dealt with the tenure of office and sub-rule (1) of this Rule stated :

> "Village Officers on attaining the age of sixty years shall retire and shall not be retained in service :
>
> Provided that the Government may require a village officer to retire at any time after he has completed thirty years of service provided that the appointing authority shall give in this behalf a notice in writing to the village officer at least three months before the date on which he is required to retire."

6. It is admitted that the petitioners in all these cases were appointed as village officers under the provisions of Madras Act III of 1895 prior to the decision of the Supreme Court referred to above, 6th December, 1960. These petitioners have been required to retire on their attaining the age of 60 years under rule 4 (1) of the Rules. The petitioners challenge this order requiring them to retire under rule 4 (1) of the Rules.

7. Though several contentions have been raised in the affidavits filed in support of the writ petitions, it is not necessary to go into all of them, since the petitioners are entitled to succeed on one ground. We have already extracted sub-rule (2) of rule 1 of the Rules. That Rule expressly states that the Rules will apply to village officers, who at the time of their appointment, were

qualified under the Board's Standing Orders applicable to them and their appointment had been made by the Authority competent under the Board's Standing Orders. In respect of these petitioners, who were appointed under the provisions of Madras Act III of 1895 before 6th December, 1960, there was no question of their being qualified to be appointed to the village office under the Board's Standing Orders applicable to them and their qualifications and appointment rested solely on the provisions contained in section 10 of the Act. Consequently the petitioners herein will not answer the description contained in sub-rule (2) of rule 1 of the Rules. If they do not answer the description contained in sub-rule (2) of rule 1 of the Rules, the Rules are not applicable to them, and therefore they cannot be required to retire under rule 4 (1) of the Rules.

8. However, the learned Government Pleader contended that the Madras Proprietary Estate Village Service and the Madras Hereditary Village Offices (Repeal) Act, 1968. (Madras Act XX of 1968) expressly stated in sub-section (3) of section 2 that the village officers who were appointed under the Act shall continue to hold office subject to such Rules as may be made under the proviso to Article 309 of the Constitution of India, that the Government, in exercise of their powers under the proviso to Article 309 of the Constitution of India, in G. O. Ms. No 2298, Revenue, dated 1st December, 1968, made a Rule applying the Board's Standing Orders to these officers and that therefore the retirement of the officers in the present cases cannot be said to be invalid or illegal. The Rule that was promulgated by G. O. Ms. Ns. 2298, Revenue, dated 1st December, 1968 was to the following effect:

> "The Standing Orders of the Board of Revenue applicable to non-hereditary village offices shall apply to every holder of a village office to which the Madras Proprietary Estates Village Service Act, 1894 (Madras Act II of 1894) or the Madras Hereditary Village Of ices Act, 1895 (Madras Act I I of 1895) was applicable immediately before the 1st day of December, 1968."

In our opinion, this notification issued by the Government under the proviso to Article 309 of the Constitution of India is not of any assistance whatever to support the orders passed against the petitioners in these cases. The effect of this Rule merely is to apply the standing orders of the Board to the officers appointed under the Act with effect from the date of the Rule. But what we are concerned with is sub-rule (2) of rule 1 of the Rules and that talks about the Board's Standing Orders applicable to the appointees at the time of their appointment and not with effect from a later date. As we pointed out already, in every one of these cases, the petitioner was appointed before 6th December, 1960, that is, before the decision of the Supreme Court referred to above, and consequently there was no question of the Board's Standing Orders being applicable to them as on that date, and hence this argument of the learned Government Pleader will be of no avail to support the orders passed by the authorities in the present case.

9. In view of this, all these writ petitions are allowed, and the orders requiring the petitioners to retire under rule 4 (1) of the Rules are declared to be invalid on the ground tha the Rules themselves are not applicable to them. There will be no order as to costs.

(Writs of Declaration etc. will follow.)

R.S. —— *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

Abdul Hameed ... *Appellant**

v.

Eganathan ... *Respondent*

Civil Procedure Code (V of 1908), Order 41, rule 20 (1)—Applicability —Suit for declaration of title against purchaser of property—Sons of vendor impleaded as defendants but remained ex parte*—Suit decreed—Appeal by purchaser —Sons of vendor not impleaded in appeal— Lower Appellate Court dismissing appeal—Dismissal whether proper.*

Held, that defendants 1 and 2 had no subsisting interest in the suit property on the date of the suit and did not also claim any such interest. They were not necessary parties to the suit. No relief was claimed against defendants 1 and 2. Therefore the plaintiff need not have impleaded them as defendants. Defendants 1 and 2 in the instant case were not interested and could not be interested in the result of the appeal as they claimed no right whatsoever in the suit property. Therefore they need not have been made parties in the appeal. The failure to implead defendants 1 and 2 did not vitiate the trial and was not a ground for dismissing the appeal. [*Para.* 5.]

Case referred to:—

Rahima Bi i v. *Sirajunnissa Bi,* (1971) 2 M. L. J. 243.

Appeal against the decree of the Court of the Subordinate Judge, Karaikal in Appeal Suit No. 23 of 1974, preferred against the decree of the Court of the District Munsif of Karaikal in Original Suit No. 6 of 1973.

F. A. Rasheed, for Appellant.

S. Haroom Ei Rasheed and A. Subramaniam, for Respondent.

The Court delivered the following

JUDGMENT.—This is a second appeal from the judgment of the learned Subordinate Judge of Karaikal, dismissing A. S. No. 23 of 1974 preferred by the third defendant against the judgment and decree in O. S. No. 6 of 1973 on the file of the Court of the District Munsif, Karaikal.

2. The respondent herein, Eganathan, filed O. S. No. 6 of 1973 for cancellation of the '*Acte de notoriate*' dated 19th June, 1954 and for a declaration of his title to the suit property. The third defendant claimed title to the suit property under a sale deed executed by the father of Defendants 1 and 2. Defendants 1 and 2 who were the sons of the vendor under whom the third defendant claims title to the suit property, were absent and set *ex parte.* The suit was decreed with costs as prayed for by the learned District Munsif.

3. Against the judgment and decree of the learned District Munsif of Karaikal, the third defendant has filed A. S. No. 23 of 1974 on the file of the Sub-Court, Karaikal, without impleading defendants 1 and 2. The plaintiff is the only respondent in the appeal. The learned Subordinate Judge dismissed the appeal on the ground that the appeal is not maintainable without impleading defendants 1 and 2.

4. The substantial question of law formulated for consideration in this second appeal is :

> "Whether the appeal before the first appellate Court was not maintainable on the ground that defendants 1 and 2 had not been impleaded as respondents ?

*S. A. No. 1444 of 1977. 10*th October,* 1980.

5. Defendants 1 and 2 had no subsisting interest in the suit property on the date of suit and did not also claim any such interest. They were not necessary parties to the suit. No relief was claimed against defendents 1 and 2. Therefore, the plaintiff need not have impleaded them as defendants.

Rule 20 (1) of Order 41, Civil Procedure Code, provides that:

> "Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent".

Defendants 1 and 2 in the instant case are not interested and cannot be interested in the result of the appeal as they claim no right whatsoever in the suit property. Therefore, they need not have been made parties in the appeal.

6. In *Rahima Bivi* v. *Sirajunnissa Bi*[1], Alagiriswami, J., has held that,

> "In case, where the party who had not been impleaded in the appeal had a substantial interest in a portion of the properties concerned in the suit or in a portion of the properties which was originally purchased, there cannot be two contradictory decrees, one upholding the validity of the transfer in favour of the original transferee and another setting it aside. It is on that ground that the failure to implead in the first appeal a party who had succeeded in the trial Court but who had not been impleaded in the lower appellate Court could not be adversely affected by a decision against his interest in the appellate Court and, therefore, no relief could be given to him. Such a consideration does not arise here. The first defendant had no interest in the property and he got no relief by the decree in the trial Court. On the other hand, the only person interested was the sixth defendant. By the first defendant not being impleaded as a party no interest of his was affected. I am, therefore, of opinion that the failure to implead the first defendant in the appeal before the lower appellate Court does not bar the sixth defendant from getting any relief in the lower appellate Court, or in this Court".

The ratio of the decision cited above is applicable on all fours to the instant case. Therefore, the failure to implead defendants 1 and 2 as respondents in the appeal does not vitiate the trial and is not a ground for dismissing the appeal. Hence, the judgment and decree of the learned Subordinate Judge, Karaikal, in A. S. No. 23 of 1974 are set aside, and the matter is remanded to the learned Subordinate Judge, Karaikal, for disposal on merits. The appeal is allowed to the extent indicated above. There will be no order as to costs. The court-fee paid on this Memorandum of Second Appeal will be refunded to the appellant.

R. S. —— *Second appeal allowed and remanded.*

1. (1971) 2 M. L. J. 243.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

E K. Venkaimarbon .... *Petitioner**

v.

Dakshinamoorthy ... *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 23* (1) (b)—*Appellate Authority constituted under the Act—Not a* persona designata *but a Court within the meaning of section 5 of the Limitation Act—Has power to excuse the delay in filing an appeal from order of Rent Controller.*

(B) *Limitation Act (XXXVI of 1963), sections 5 and 29 (2)—Applicability to proceedings under Rent Control Act.*

An Appellate Authority under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 has power to excuse the delay in filing an appeal from an order of the Rent Controller.

The approach which section 29 (*b*) of the Limitation Act demands as regards any special or local law is whether such law expressly rules out, either wholly or to any lesser extent, the applicability of section 5 of the Limitation Act and not whether such law is a complete code providing for everything or almost everything, [*Para.* 3.]

All the earlier decisions of our High Court have procceded on the footing that an Appellate Authority under the Rent Control Act is not a 'Court' but a *persona designata* and because he is a *persona designata* he cannot be regarded as a Court for the purpose of invoking section 5 of the Limitation Act. The gist of the Supreme Court decision in *Central Talkies Limited* v. *Dwarka Prasad,* (1962) 2 S. C. J. 41 : (1961) 3 S. C. R 495 : A. I R. 1961 S. C 606 is that only those appointed by their proper names are *persona designata* and it would be a misnomer to regard as *persona designata* those who are appointed by reference to a class name or by a generic description of status or legal character. In the face of this decision all the earlier decisions of our High Court must be regarded as incorrectly rendered when they said that the Appellate Authority constituted uner section 23 of the Rent Control Act was *persona designata.* [*Para.* 5, 9.]

The Appellate Authority under section 23 of the Rent Control Act can well be held to be Court for purposes of section 5 of the Limitation Act. An examination of the role of the Appellate Authority in the hierarcy of tribunals under the Rent Control Act also leads us to the same conclusion. Under the statutory scheme it is the allotted function of this authority to hear appeals against orders passed in the first instance by the Rent Controller. As an appellate authority its powers are co-equal to those of the Rent Controller. The Act provides for a hearing procedure. Provision is made for appearance of parties by counsel. The Appellate Authority has power to make further inquiry or remand the matter for further inquiry. The Appellate Authority is armed also with a powers to stay the operation of the order appealed against. The Appellate Authority has finally to decide the appeal. Any order it passes has the force of a decree and is executable as a decree. The Appellate Authority has power to award costs and vary the Rent Controller's order for costs. Above all, the Appellate Authority's decision is subject to revisional jurisdiction of the High Court. In every sense, therefore, the Appellate Authority under the Rent Control Act deserves to be regarded as a Court. [*Para* 21.]

There are many cases in books which have concerned themselves with determining whether this or that tribunal is a Court within the scope of section 5 of the Limitation Act. It is difficult to reconcile all the cases. Nor is it easy to pick out of them all a common thread of principle which lays down what is that which distinguishes a Court from a pseudo-court or a non-court. For instance,

*C. R. P. No. 1667 of 1978. *30th January,* 1980.

a Labour Court is not regarded as a Court for purposes of section 5, whereas a Registrar of Assurances is so regarded. The best we can do, therefore, is to concentrate on the particular judicial or quasi-judicial tribunal we have on hand and find out on an examination of its origins, its functions and its tenure, whether it can be treated as a court for purposes of section 5 of the Limitation Act. There is no principle or precedent now, which stands in the way of holding that the Appellate Authority under the Rent Control Act are Courts within the meaning of section 5 of the Limitation Act.
[*Paras.* 22 *and* 23].

A place for rent control legislation in the statute book can be justified only on its claim to be a beneficial legislative measure, reflecting the concern of a welfare state to keep in proper check the abrasive relations between landlords and tenants who at present form the bulk of middle class urban populatation. To deny either the tenants or even the landlords the right or the privilege of getting an extension of time on sufficient cause being shown would tend to defeat the very purpose of the statute in creating a special machinery for a satisfactory resolution of disputes. There is a lot to be said for maintaining a certain tempo in the administration of justice, and for imposing periods of rest, in the enforcement of rights and obligations. But rigidity of law in matters of this kind might be self-defeating. Far from advancing the cause of justice, it might be the cause of rank injustice. A legal system must therefore temper the rigour of legal procedure by reference to the realities of law practice, at least in deserving cases. This is the whole rationale behind section 5 of the Limitation Act. [*Para.* 26.]

It could not be the intention of the framers of the Rent Control Act that parties should labour under a handicap and be put out of the reach of the Appellate Authority in circumstances which would present little or no problem to similar persons before other appellate forums. There is nothing inherently extraordinary about the fixation of time-limit for an appeal under the Rent Control Act that any idea of excusing the delay even for sufficient cause must be assumed to have been quite beyond the contemplation of the State legislature. [*Paras.* 26 27.]

Cases referred to:—

Abdul Wahid v. *Abdul Khader*, I. L. R. (1948) Mad. 43 : (1947) 1 M. L. J. 207 : 60 L. W. 199 : 1947 M. W. N. 200 : A. I. R. 1947 Mad. 400; *Chinniah Thevar* v. *F. M. Badsha*, (1948) 1 M. L. J. 314: 61 L. W. 364 : 1948 M. W. N. 379 : A. I. R. 1948 Mad. 439; *Rajan Ayyar* v. *Pavanammal*, A I. R. 1949 Mad. 787; *Easwaran* v. *Palaniammal*, 1974 T. N. L. J. 380 ; *Ganapathy* v. *Kumaraswami*, 1975 T. N. L. J. 264 ; *Central Talk.ies Ltd.* v. *Dwaraka Prosad*, (1961) 1 Crl. L. J. 740 : (1962) 2 S.C.J. 411 (1961) 3 S. C. R. 495 : A. I.R. 1961 S. C. 606; *Commissioner of Sales Tax* v. *Madanlal and Sons*, (1976) 38 S. T. C. 543 . 1977 Tax. L. R. 1626 : (1977) 1 S. C. R. 683 : (1976) 4 S. C. C. 464: A. I. R 1977 S. C. 523 ; *Commissioner of Sales Tax* v. *Parsons Tools and Plants*, (1975) 35 S. T. C. 413 : 1975 Tax. L. R. 1529 : (1975) 4 S. C. C. 22 : (1976) 1 S. C. C. 22 :(1976) 1 S. C. J. 242 : (1975) 3 S. C. R. 743 : A. I. R. 1975 S. C. 1039; *Raghunath Agarwalls* v. *State of Orissa*, 3 S. T. C. 461 : 1975 Tax. L. R. 2075 ; *Gandharb Misra* v. *State of Orissa*, (1975) 36 S. T. C. 466: 1976 Tax. L R. 1650; *Achuthan Nair* v. *Kuppah Shah*, (1959) 1 M. L. J. 148. 1958 M. W. N. 576.

M/s Pathy and *Sundaram*, for Petitioner.

A. V. Dhanakoti, for Respondent.

The Court delivered the following

JUDGMENT.—The question in this case is whether an appellate authority under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 hereinafter called the Rent Control Act has power to excuse the delay in filing an appeal from an order of the Rent Controller. The appellate authority concerned in this case is Thiru A. Raman, the Principal Subordinate Judge, Cuddalore. He said that the Rent Control Act gave him

no power to excuse any delay in the appeal. He said that the Act was a complete Code in itself. He said that section 5 of the Limitation Act, 1963 had no application to the proceedings before him as an appellate authority under the Rent Control Act.

2. The learned Subordinate Judge is right in thinking that the Rent Control Act is a complete Code. But that, by itself, does not rule out the application of section 5 of the Limitation Act, 1963. The Limitation Act, 1963 is a central legislation on a concurrent subject under our Constitution. It lays down generally the law relating to limitation. Section 29 (2) of the Limitation Act, 1963, however, takes note of special or local laws which might prescribe special periods of limitation in a way not found in the Schedule to the Limitation Act. Section 29 (2) saves these special periods of limitation, by the simple expedient of declaring that all such special periods shall be deemed to have been incorporated in its own Schedule. Having done so, section 29 (2) further provides that to these special periods of limitation prescribed by special and local laws, the provisions of sections 4 to 24 of the Limitation Act shall, as a rule, apply except where the special or local law concerned expressly excludes or limits the application of these sections.

3. The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 is a special law in the sense that it provides a special machinery for proceedings between landlords and tenants of buildings. It is also a local law because it does not have any force beyond the confines of this State, and even in this State it applies only to certain areas such as cities and municipal towns. Section 29 (2) of the Limitation Act would, therefore, govern the special periods prescribed in this Act. Section 23 (1) (*b*) of our Rent Control Act prescribes a time-limit of 15 days for filing an appeal from an order of the Rent Controller. Neither in section 23 (1) (*b*) nor elsewhere in the Rent Control Act is there any provision which runs counter to section 5 of the Limitation Act. It, follows, therefore that section 5 of the Limitation Act applies to an appeal provided under section 23 of this Act. The question is not whether our Rent Control Act is a complete Code, in the sense that it provides for everything or almost everything. The question is, whether it expressly rules out, either wholly or to any lesser extent, the applicability of section 5 of the Limitation Act. This is always the approach which section 29 (2) of the Limitation Act demands as respects any special or local law. This is illustrated by another limitation provision in this very Rent Control Act, namely, section 25 (2). This section prescribes a period of one month as the time limit for a revision to the High Court from an order passed by an appellate authority. Under the proviso to section 25 (2), however, the High Court is empowered to admit a revision beyond the time-limit. But this power of extension is itself subject to the restriction that the High Court cannot extend the time, in any case, beyond one month of the expiry of the period of limitation. This means that whatever might be the cause and however sufficient it might be, the High Court will be powerless to condone the delay beyond one month. There is no such restriction on the Court's power no extend the time under section 5 of the Limitation Act. Section 23 and section 25 of the Rent Control Act thus present a study in contrast. To section 23, section 5 of the Limitation Act fully applies, precisely for the reason that that provision does not expressly apply section 5. Section 25 rules out section 5 precisely for the reason that it expressly legislates on the very subject which is dealt with by section 5.

4. There are cases in the books which say that section 5 of the Limitation Act is capable of being applied to a special or local law only where the special or local law prescribes a period of limitation for proceedings before a Court. They mention that there is a pointed reference in section 5 of the Limitation Act to a 'Court'. According to the decisions, this reference to a 'Court' at once rules out the applicability of section 5 of the Limitation Act to applications and appeals which are not before Courts.

5. As for the appellate authorities functioning under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, a similar view has been expressed by learned Judges of this Court in a long line of decisions spanning a period of more than three decades. There are rulings by Yahya Ali, J., in *Abdul Wahid* v. *Abdul Khader*[1] by Clarke, J., in *Chinniah Thevar* v. *F. M. Badsha*[2] by Mack, J., in *Rajan Ayyar* v *Pavanammal*[3] by N. S. Ramaswami, J., in *Easwaran* v *Palaniammal*[4] and by Gokulakrishnan, J., in *Ganapathy* v. *Kumaraswami*[5]. All these learned Judges have uniformly held that an appellate authority under our Rent Control Act is not a Court. The reason which they have expressed for this view is also uniform. All of them proceed on the footing that an appellate authority is *persona designata*, and because he is *persona designata*, he cannot be regarded as a Court for the purpose of invoking section 5 of the Limitation Act.

6. It is noteworthy that with the solitary exception of Gokulakrishnan, J., all the other learned Judges have not taken the trouble to explain what they mean by a *persona designata* and why they regard the appellate authority under the Rent Control Act as *persona designata*. It would not, therefore, be wrong to say that their views are based on the tacit assumption that an appellate authority is *persona designata* without first settling who a *persona designata* is.

7. The Supreme Court had occasion to lay down what meaning must be assigned to this expression '*persona designata*' in legal writings. This is what they said in *Central Talkies Ltd.* v. *Dwarka Prasad*[1].

> "A *persona designata* is a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class or is filling a particular character"

8. After this decision, we are, I think, bound to apply this test in every case that comes before us to find out whether any appointee to an office or any one conferred with a power is or is not *persona designata*. We must accordingly apply the same test to the appellate authority constituted under the Rent Control Act. We must not flinch from applying the decision of the Supreme Court merely out of respect for the long line of previous decisions of learned Judges of this Court.

9. The gist of what the Supreme Court said was that only those appointed by their proper names as Mr. 'So-and So' or Miss. or Mrs. So-and-So' are *persona designata*. It would be a misnomer, and a misconception in law, to regard as *persona designata* those who are appointed by reference to a class-name, or by a generic description of status or legal character. The question then is, what is the position of appellate authorities under our Rent Control Act? How do they emerge as appellate authorities under that Act?

10. Section 23 of the Act says that the State Government may confer the powers of appellate authority on any 'authority' or 'officer' they may think fit. Mark the words 'authority' and 'officer'. These expressions clearly forbid any appointment by Government of named individuals. The Government cannot appoint Thiru X, or Thiru Y, or Thiru Z, as appellate authority. What is more, the statute restricts the Government's choice even in cases where persons bear a certain character. For instance, the Government cannot appoint any office-holder like the President of the Lawyers Association or the Secretary of a Chamber of Commerce although such appointees may not, strictly, be *persona designata* in the sense that they are not appointed by their proper names. The choice of the State Government under section 23 is limited to authorities and officers. They much be either officers or authorities functioning under the imprimature of a

1. (1947) 1 M.L.J. 207 : I. L. R. (1948) Mad. 43 : 60 L W. 199 : A. I. R. 1947 Mad. 400.
2. (1948) 1 M. L. J. 314 : 61 L. W. 354 : (1948) M. W. N. 379 : A. I. R. 1948 Mad. 439.
3. A.I R 1949 Mad. 787.
4. (1947) T. N. L. J. 380.
5. (19-5) T N L. J. 264.
6. (1962) 2 S. C. J. 41 : (1961) 3 S. C. R. 495: A.I.R. 1961 S.C. 606.

statute or statutory instrument in the service of the State. What is more, those on whom the State Government may choose to confer appellate jurisdiction under the section must already be functioning as authorities and officers. The jurisdiction is conferred only on existing officers and existing authorities. The appellate authority is not a new authority, but an old authority with new powers, like new wine in an old bottle.

11. The State Government have seldom, if ever, misunderstood the scope of their powers of appointment under section 23 of the Act. All their notifications from the very inception of the Act down to the present day have been directed to conferring appellate powers only on pre-existing officers. As it happens, all of them are members of the Tamil Nadu State Judicial Service. The first general order to this effect was passed by the Government in Notification II-1 No. 3310 of 1961 published in the Fort St. George Gazette dated 9th August 1961. This was replaced by another order, which is currently in force, subject to some subsequent amendments. This later order was notified in the Gazette dated 30th June, 1973 in Notification II-1 No. 3006 (*f*) of 1973. Under the broad scheme of this Notification, the State is divided presently into the City of Madras, on the one hand, and stations in the Districts in mofussil on the other. For the metropolitan area, appellate powers under the Act have been conferred on all the Judges of the Court of Small Causes, Madras, excepting the 6th, 7th and 8th Judges. For areas in the mofussil, all Subordinate Judges are to be appellate authorities within their respective jurisdictions. To tackle places where there are more Subordinate Judges than one, the Government's Notification laid down that the Principal, Subordinate Judge shall alone be the appellate authority under the Act.

12. Incidentally, this was how Thiru A. Raman happened to have jurisdiction as appellate authority when the appeal in the instant case came to be filed before him. It is not pretended that Thiru Raman was personally called by the State Government and appointed by name as the appellate authority under the Rent Control Act for Cuddalore Town. The basis of his jurisdiction seems from his being the Principal Subordinate Judge, at Cuddalore and from the terms of the Government order published in the Notification dated 30th June, 1973 which clothed the Principal Subordinate Judge with powers of the appellate authority under the Act.

13. It is thus demonstrable from the record that the appellate authority in this case, namely, the Principal Subordinate Judge, Cuddalore, as well as the other appellate authorities functioning under the Rent Control Act in different parts of the State are all possessed of appellate jurisdiction under the Act because they were at the time of their appointment authorities or officers already in service and already functioning as such under the State Judicial Service. They were by no stretch of language or semantics appointed *persona designatae.*

14. In none of the earlier decisions rendered by learned Judges of this Court, has there been any inquiry as to the jural basis on which appellate authorities were to be constituted under section 23 of the Rent Control Act. Nor was there any discussion about the effect of the Government Notification under which appellate powers under the Act were actually conferred on those who were already active members of the State Judicial Service.

15. All the earlier decisions to the contrary, rendered by learned Judges of this Court are thus based on a thorough misconception alike of the legal attributes of *persona designata* and of the terms of the statute and the statutory notifications. It follows, therefore, that none of these decisions are strictly binding on me as *per curium.* I am, on the contrary, bound by the decision of the Supreme Court to which I have earlier referred. I must accordingly pursue the line, and reach the result, dictated by that decision.

16. Gokulakrishnan, J., in the decision in *Ganapathy* v. *Kumaraswami*[1], also had the opportunity of applying the decision of the Supreme Court and coming to the same conclusion to which I am inexorably driven in this case. The Supreme Court's decision was judicially noticed in his judgment. But he to took the view that the Supreme Court did not lay down any binding principle for application to the position and powers of appellate authorities under our Rent Control Act. Having entertained this view, the learned Judge apparently thought he was bound to adhere to the long line of authorities of learned Judges of this Court, beginning from Yahya Ali, J. And in disposing of the case before him, he simply adopted, without question, the view expressed by them to the effect that an appellate authority is *persona designata* and is appointed as such under section 23 of the Rent Control Act.

17. I think the Supreme Court's decision cannot be robbed of its authority by being isolated or limited to its facts. On the contrary, it must be properly understood as having laid down a legal distinction which is highly relevant to an understanding of the position of the appellate authority under the Rent Control Act. In my judgment, it is precisely because all the learned Judges of this Court had worked upon the assumption that an appellate authority under the Act is *persona designata* that the judgment of the Supreme Court must come to be accepted as the preferred precedent, for cases like the present one. This has got to be so, because the expression, *persona designata*, which had all along been misunderstood by learned Judges, came to be clarified and vivified by the Supreme Court in this judgment. And once the clarification came, it necessarily became part of the law to be applied in every other case where the question arose whether the appointment of someone was as *persona designata* or otherwise.

18. Even the particular context of the facts before the Supreme Court in which they had entered their enunciation about *persona designata* has a bearing to the present discussion. The Supreme Court in that case had to deal with the argument that a District Magistrate was *persona designata* under a particular statute, and that being so, an Additional District Magistrate could not lawfully do what the District Magistrate alone was empowered to do under that statute. The question arose in an ejectment suit which was instituted by a landlord against a tenant under section 3 of the United Provinces (Temporary) Control of Rent and Eviction Act, 1946. Under that particular provision, any landlord seeking to sue his tenant in ejectment on certain grounds must get the prior permission of the District Magistrate; otherwise the suit would not lie. The landlord in that case got the permission of an Additional District Magistrate. This officer was a Magistrate of the First Class on whom the Provincial Government had conferred powers as District Magistrate under section 10 of the Criminal Procedure Code. The question was whether an Additional District Magistrate can give permission under the Uttar Pradesh Eviction Act, 1946. It was argued before the Supreme Court for the tenant that when section 3 of that Act named the District Magistrate, he was *persona designata* and this meant that any one other than a District Magistrate could not discharge that function. The Supreme Court rejected this contention. It was while examining the validity of this argument that the Supreme Court had to go into the question of what was meant by *persona designata*, and they did so in the passage which I have earlier quoted. It was urged before the Supreme Court in that case that there was no provision in the Uttar Pradesh Eviction Act enabling an Additional District Magistrate to be equated to a District Magistrate. The Supreme Court rejected this contention and said it was quite sufficient that the Additional District Magistrate was conferred with the powers of a District Magistrate by the Provincial Government under section 10 of the Criminal Procedure Code. The Supreme Court's view was that the power of sanctioning an eviction suit was conferred by the U. P. Act not to a named individual, but to the District

1. (1975) T. N. L. J. 264.

Magistrate and this power applied to all those who under the general law belonged to that class, or bore that legal status.

19. The reasonings in the decision of the Supreme Court in all its detail shows the pertinence of that authority to the present discussion. We cannot seek to distinguish the Supreme Court's decision on the score that the Uttar Pradesh Act is not *in pari materia* with our Rent Control Act. Nor can we argue that the Supreme Court's decision turned on the terms of the Criminal Procedure Code or on the terms of a notification issued under that Code. I am of the view that the decision of the Supreme Court is very much in point, and in the face of that authoritative ruling, all the earlier decisions of this Court, not excluding that of Gokulakrishnan, J., must be regarded as having been incorrectly rendered, when they said that the Appellate Authority constituted under section 23 of our Rent Control Act is *persona designata.*

20. As I earlier mentioned, the whole logic behind the decisions of this Court was that section 5 applied only to Courts and that appellate authorities under the Rent Control Act are not Courts because they are *persona designata.* If on the basis of the decision of the Supreme Court, it would be quite an error to dub them as *persona designata*, then the only objection to their being regarded as Courts goes, and section 5 of the Limitation Act must, without any further ado, apply. For, in none of these cases do we find any other objection put forward as to why an appellate authority cannot be called a Court.

21. Section 5 of the Limitation Act does not deign to define who or what a Court is. The books contain reports of decisions as to whether *this* or *that* tribunal is or is not a Court for the purposes of section 5 of the Limitation Act. But no decision has gone to the extent of supplying what the legislature has omitted, namely, a working definition of what a Court is for purposes of section 5. Considering the scheme of the Limitation Act as a whole and section 29 (2) of that Act relating to special and local laws, it might, I think, be reasonable to suppose that an appellate authority under section 23 of the Rent Control Act can well be held to be a Court for purposes of section 5 of the Limitation Act. An examination of the role of the appellate authority in the hierarchy of tribunals under the Rent Control Act would also lead us to the same conclusion without raising forensic qualms of any kind. Under the statutory scheme, it is the allotted function of this authority to hear appeals against orders passed in the first instance by the Rent Controller. As an appellate authority, its powers are co-equal to those of the Rent Controller. The Act provides for a hearing procedure. Provision is made for appearance of parties by counsel. The appellate authority has power to make further inquiry or remand the matter for further inquiry. The appellate authority is armed also with a power to stay the operation of the order appealed against. The appellate authority has finally to decide the appeal. Any order it passess has the force of a decree and is executable as a decree. The appellate authority has power to award costs and vary the Rent Controller's order for costs. Above all, the appellate authority's decision is subject to the revisional jurisdiction of the High Court. In every sense, therefore, the appellate authority under the Rent Control Act deserves to be regarded as a Court. This is, perhaps, the reason why all the earlier decisions of this Court had singularly harped on the notion of *persona designata*, now seen to be mistaken, as the only ground for not recognising the appellate authority to be a Court.

22. As I earlier mentioned, there are many cases in the books which have concerned themselves with determining whether this or that tribunal is a Court within the scope of section 5 of the Limitation Act. It is difficult to reconcile all the cases. Nor is it easy to pick out of them all a common

thread of principle which lays down what is that which distinguishes a Court from a pseudo court or a non-court. For instance, a Labour Court is not regarded as a Court for purposes of section 5, whereas a Registrar of Assurances is so regarded. The best we can do, therefore, is to concentrate on the particular judicial or quasi-judicial tribunal we have on hand and find out on an examination of its origins, its functions and its tenure, whether it can be treated as a Court for purposes of section 5 of the Limitation Act. We should not be comparing notes in cases of this kind, and seeking to decide the place of any given authority under section 5 by analogical deductions drawn from other cases having to do with other tribunals created under other statutory enactments.

23. There is as yet no decision which discusses the position of an appellate authority under the Rent Control Act with particular reference to the nature and function of that authority. In all the earlier decisions of this Court which I have cited, no attempt whatever was made to find out if the appellate authority, by virtue of the statutory role it fills, is a Court or not. Attention was rivetted solely to the manner of appointment. And even with this extremely limited approach to the question the Courts had led themselves to error, as shown by the Supreme Court's ruling. There is, accordingly, no principle or precedent now, which stands in the way of my holding that appellate authorities under the Rent Control Act are Courts within the meaning of section 5 of the Limitation Act.

24. Apart from the indications in the scheme and structure of the Rent Control Act itself, there are other weighty considerations of practical significance which seem to me to point to the same conclusion. The time-limit under section 23 for an appeal is a period of 15 days. It must, I think, rank amongst the shortest time-limits prescribed for any appeal under any statute. I concede that the legislature must be left to its wisdom in matters of this kind. And if the legislature had thought that this duration was sufficient to enable a party to make up his mind whether to appeal or not, the Courts shall have very little to say on the point. But Courts are not, on that account, to close their eyes to the realities of litigation. Any one who knows anything about our legal system must grant that fifteeen days' time, in actual practice, must turn out to be woefully inadequate. Practical difficulties abound under present day conditions which might beset even fairly diligent appellants from keeping to the time-schedule. A short time-limit may not matter if the procedure involves no exertion to the appellant excepting the exertion of filing the appeal memorandum. This can be ensured if copies of the order of the Rent Controller are, as a matter of course, delivered at the party's doors. The procedure under the Act, however, is different. While the Rent Controller is required to pronounce his order in open Court, the parties have to apply for copies and keep a watch over the notice board all the time. This procedure involves many traps for the unwary. And limitation always lies in wait, and begins to run when least expected. These are only a few of the considerations which might throw doubt, on the wisdom of limiting the time for an appeal to a paltry fifteen days, without at the same time providing for condonation of the delay in appropriate cases.

25. Rent Control cases are now about the most important and the most prolific line of private civil litigation in this country. The normal period of gestation for an eviction petition before the Rent Controller and the appellate authorities is not inconsiderable. Parties may have to bide their time to get a decision. It may take six months or a year or more, even for the hearing to be taken up. I see no logic in forcing a party to hurry with filing his appeal, when he has to wait for a long time getting a decision, and our legal system can do nothing about it. Parties wishing to appeal against an order of a Rent Controller, the same as appellants in a regular appeal suit, may be victims of circumstance, such as death in the family or illness They may be susceptible to other disturbances or distractions beyond their

control All of which might prevent them from hastening to the appellate body within the time stipulated for presenting the appeal. It would be odd and quite irrational that the same cause which would provide a party with a lawful excuse in an appeal before a regular Court of appeal should prove worse than useless in a rent control appeal.

26 A place for rent control legislation in the statute book can be justified only on its claim to be a beneficial legislative measure, reflecting the concern of a welfare state to keep in proper check the abrasive relations between landlords and tenants who at present form the bulk of middle class urban populations. To deny either the tenants or even the landlords the right or the privilege of getting an extension of time of sufficient cause being shown would tend to defeat the very purpose of the statute in creating a special machinery for a satisfactory resolution of disputes. There is a lot to be said for maintaining a certain tempo in the administration of justice, and for imposing periods of rest in the enforcement of rights and obligations. But rigidity of law in matters of this kind might be self-defeating. Far from advancing the cause of justice, it might be the cause of rank injustice. A legal system must therefore temper the rigour of legal procedure by reference to the realities of law practice, at least in deserving cases. This is the whole rationale behind section 5 of the Limitation Act. I do not see how it could have been the intention of the framers of the Rent Control Act that parties should labour under a handicap and be put out of reach of the appellate authority in circumstances which would present little or no problem to similar persons before other appellate forums.

27. These are practical considerations which seem to me of a weighty character. I am persuaded to hold that there is nothing inherently extraordinary about the fixation of time-limit for an appeal under the Rent Control Act that any idea of excusing the delay even for sufficient cause must be assumed to have been quire beyond the contemplation of the state legislature.

28. Even if the appellate authorities are held to be not Courts, in a puritan sense of the expression, yet the principle behind section 5 of the Limitation Act must, in my judgment, be applied according to the dictates of justice, equity and good conscience. This is a position which I derive with confidence from two decisions of the Supreme Court. As far as my knowledge goes, both these cases are reported only in specialised tax reports, and not in law journals in general circulation. The first case is reported as *Commissioner of Sales Tax v. Madanlal and Sons*[1]. In this decision, the Supreme Court had to consider the validity of proceedings before a sales tax revisional authority going by the name 'Judge (Revision)' functioning under section 10 of the Uttar Pradesh Sales Tax Act, 1948 In an earlier decision *Commissioner of Sales Tax v. Parson Tools and Plants*[2] the Supreme Court had occasion to hold that the Judge (Revisions) under the Uttar Pradesh Sales Tax Act, 1948, was not a Court within the meaning of section 14 of the Limitation Act, 1960. Nevertheless, in their subsequent decision, the Supreme Court applied section 12 (2) of the Limitation Act in a revision filed by an assessee before that very authority. The Supreme Court rejected the argument based on the circumstance that the Uttar Pradesh Sales Tax Act was a complete Code and it did not contain any provision like section 12 (2) of the Limitation Act. The Supreme Court applied section 29 (2) of the Limitation Act on the score that the Uttar Pradesh Sales Tax Act was a special and local Act. They further held that there was nothing in the Uttar Pradesh Sales Tax Act which expressly excluded the application of section 12 (2) of the Limitation Act. They accordingly concluded that section 12 (2) of the Limitation Act can be relied upon in computing the period of limitation for a revision petition under section 10 of the Uttar Pradesh Sales Tax Act.

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1. (1976) 38 S. T. C. 543 : 1977 Tax. L. R. 1626 : (1977) S. C. R. 683: 1976) 4 S. C. C. 464 A.I R. 1977 S. C. 523.

2 (1975) 35 S T. C 413· 1975 Tax L R. 1529 : (1975) 4 S. C. C. 22: (1976) 1 S. C J. 242 : (1975) 3 S.C.R. 743: A. I. R 1975 S. C. 1039.

29. I regard this decision of the Supreme Court as authority for the position that even though a limitation provision in a special law relates to a proceeding before a quasi-judicial tribunal and not before a Court in the strict sense of the term, yet by the force of section 29 (2) of the Limitation Act, the provisions of section 12 (2) of the Limitation Act may be applied for computing the special period of limitation, notwithstanding that the special or local law does not itself contain a provision of that kind. It may be of interest to consider the language of section 12 (3) of the Limiation Act which makes mention of the expression 'Court' even as section 5 does. But this consideration apparently did not deter the Supreme Court from applying section 12 (2) to a proceeding before a taxing authority sitting in revision. Apparently, the Supreme Court thought that in such cases the inquiry was not so much whether any section of the Limitation Act, *in terms*, applied but whether the *principle* of the section had application.

30. This approach is illustrated more explicitly in the earlier decision of *Commissioner of Sales Tax* v. *Parson Tools and Plants*[1]. It that case, the question before the Court was :

> "Whether section 14 (2) of the Limitation Act, 1963, *in terms*, or, *in principle*, can be invoked for computation of the period of limitation for filing a revision under section 10 (3-B) of the Uttar Pradesh Sales Tax Act, 1948 ?".

On the first part of the question, the Supreme Court held that the revisional authority under the Uttar Pradesh Sales Tax Act known as a Judge (Revisions) was not a Court. They referred to the language of section 14 of the Limitation Act which refers to a Court and held that section 14 will not *per se* apply to a sales tax revision before a Judge (Revisions) notwithstanding section 29 (2) of the Limitation Act. The Supreme Court, however, did not close the discussion with holding that the revisional authority under the Uttar Pradesh Sales Tax Act was not a Court. They procedeed to discuss the question whether the principle behind section 14 (2) of the Limitation Act can be applied to the sales tax revision petition by reference to the fundamental doctrines of justice, equity, and good conscience. The following are the prefatory words with which the Supreme Court entered into a detailed discussion of the scheme and the relative provisions of the Uttar Pradesh Sales Tax Act.

> "Further question that remains is :
>
> Is the general principle underlying section 14 (2) applicable on grounds of justice, equity and good conscence for excluding the time spent in prosecuting the abortive applications under rule 68 (6) before the appellate authority for computing limitation for the purpose of revision applications".

31. In the course of the discussion in that case, the Supreme Court expressed the view that

> "....... from the scheme and language of section 10, the intention of the Legislature to exclude the unrestricted application of the principles of sections 5 and 10 of the Limitation Act is manifestly clear".

32. This decision is valuable not so much for the actual decision in the case under the particular scheme and purpose of the Utatr Pradesh Sales Tax Act as for its being an example as to how the provisions of the Limitation Act have to be construed and applied to special or local laws prescribing special periods of limitation. The method of approach which the Supreme Court pursued in that case is, in my view, eminently adaptable for the purposes of the present case as well. That approach is not merely to see whether sections 4 to 24 of the Limitation Act literally applies to any special law or local law prescribing a special

1. (1976) 1 S. C. J. 242 : 1975 Tax. L. R. 1529 : (1975) 35 S. T. C. 413.

period of limitation, but to find out whether the principles incorporated in any of these provisions are applicable having regard to the scheme, the structure and the thrust of the provisions of the special or local law concerned. The Supreme Court had justified this manner of inquiry as one dictated by the rules of justice, equity, and good conscience—principles which remain for ever paramount under our Court system.

33. I have in an earlier context in the present discussion indicated the purpose of the Rent Control Act, the kind of proceedings for which the Act has created appropriate machinery by constituting a hierarchy of tribunals, and also the important part which the appellate authority has to play in the resolution of disputes, not to speak of its functions, its powers and its duties. I have also touched upon some of the pragmatic considerations which in actual practice, considerably affect the fortunes of the parties in rent control proceedings. Having regard to all these considerations, I have no doubt whatever that the legislature could not have closed its mind altogether against placing an appellant before an appellate authority under section 23 at least in the same position as an appellant before a civil appellate Court. Nor am I prepared to accept that when the legislature thought fit to provide for extension of time for filing a revision under section 25 where the period of limitation is somewhat more liberally fixed as one month, the legislature, at the same time, had set its mind totally against a similar indulgence in the realm of appeal in which it had already cut short the period of limitation to 15 days, barely half of that which it had assigned to a revision. The inference from this statutory scheme, on the contracy must rather be that the legislature being quite aware of the imperatives of section 29 (2) of the Limitation Act was content to let the limitation therein enacted to take its course by not legislating on the subject. This is also clear from the position that when the legislature thought of legislating at all, which was in section 25, it was only to cut down the latitude which the High Court would otherwise would have had quite freely under section 5 of the Limitation Act. It is in this sense that the inaction of the legislature in section 23 is masterly, for it leaves room for the principles of section 5 to be read into section 23 of the Act in their full plenitude.

34. The decision of the Supreme Court in *Madanlal & Sons's case*[1] provides an illustration to show that the principles of section 4 to 24 of the Limitation Act can be applied to special or local laws in the absence of any express provision to the contrary in these laws. It may be observed, incidentally, that the Orissa High Court applied the basic idea of section 5 of the Limitation Act, on the principles of justice, equity, and good conscience in order to condone the delay in filing a reference application under the Orissa Sales Tax Act, 1947. *Vide Raghunath Agarwalla* v. *State of Orissa*[2] and *Gandhar Misra* v. *State of Orissa*[3]. The learned Judges of the Orissa High Court relied in that regard on the two decisions of the Supreme Court.

35. I do not wish to notice any other reported decision, excepting *Achuthan Nair* v. *Kuppah Shah*[4] a case decided by Rajagopalan, J., under section 12 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, 1949. In that case an appellant before an appellate authority filed a belated appeal and asked for condonation of the delay invoking section 5 of the Indian Limitation Act, 1908 read with section 29 (2) of that Act. Rajagopalan, J., agreed that section 29 (2) of the Limitation Act applied to that case, but nevertheless held that seetion 5 of the Limitation Act cannot be invoked. The basis of his decision was that section 29 (2) of the Indian Limitation Act, 1908, did not apply to section 5, but expressly excluded it from application to special and local laws.

36. The importance of this decision lies as much in what it said as in what it left unsaid. Rajagopalan, J., did not say that the appellate authority under the Rent Control Act was *persona designata* and not a Court and hence section 3 did not apply. All that he said was that section 5 is not one of the

1. (1976) 38 S. T. C. 543 : 1977 Tax L. R. 1626.
2. (1975) Tax L. R. 2075: 36 S. T. C. 461.
3. (1975) 36 S. T. C. 466: 1976 Tax L. R. 1650.
4. (1959) I M. L. J. 148 : 1958 M. W. N. 576.

applied sections in section 29 (2) of the Indian Limitation Act, 1908. I fancy that if section 29 (2) had been cast in its present mould in the Indian Limitation Act, 1908, the learned Judge might well have sustained the applicability of section 5 of the Limitation Act. That I think was fairly implicit in his judgment Incidentally, I may also observe that while the preamble to the Indian Limitation Act, 1908, specifically referred to 'proceedings in Courts' the preamble to the Limitation Act, 1963, generously declared that it was intended 'to consolidate and amend the law for the limitation of suits and other proceedings', eschewing any reference to Courts.

37. The result of the above discussion is that the application filed by the appellant before the appellate authority for excusing the delay in filing the appeal was quite, competent, and nonetheless so for its having been filed under section 5 of the Limitation Act, 1963 The appellate authority was in error in assuming that he had no jurisdiction to hear and determine the application. The dismissal of the application *in limine* therefore amounts to failure to exercise jurisdiction.

38. The appellate authority in its order did not stop short with saying that the application did not lie. The order contained a further remark that there was no sufficient cause. I regard this is an off-the-cuff finding, which the appellate authority had permitted itself to make only because it felt quite sure all the while that the application itself had to be dismissed as incompetent. I think this is not a proper way of disposal. If a judicial authority does not wish to limit its decision to a preliminary question as to jurisdiction or as to the competence of proceeding before it, but prefers to enter a finding on the merits as well, it is its duty to do so by going the whole-hog with the issues on merits. It cannot render less than what it should do by way of a finding on the merits, merely because it is already committed to the view that the proceedings do not lie anyway. In this sense, the finding of the appellate authority in this case that the appellant had not made out sufficient cause is not a proper finding and no effect should be given to it.

39. The result is that the order of the appellate authority (the Principal Subordinate Judge, Cuddalore) is set aside. The application under section 5 of the Limitation Act is restored to its file. The appellate authority is hereby directed to hear and determine that application on merits. If it is satisfied that the appellant had sufficient cause for not filing the appeal within time, it is its duty to entertain the appeal and proceed to go into its merits in accordance with the law.

40. The Civil Revision petition is accordingly allowed and the matter is remanded. There will, however, be no order as to costs.

R. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan and V. Sethuraman JJ.*

Dr. A. U. Natarajan and another .... *Petitioners**

v.

Indian Bank, Head Office at 17, North Beach Road, Madras-1 Branch at Dewan Bahadur Road, Coimbatore-8 .... *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 66—Execution—Auction sale—Fixation of upset price by Court—Includes power to reduce upset price—Introduction of second proviso to rule 66 (2) clause (a) *by Act (CIV of 1976)—Right of Court not infringed—Scope of rule 66.*

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*C.R.P. No. 1199 of 1980. *24th September,* 1980.

The Court's power to fix an upset price for the property, which includes within it a right to reduce the upset price wherever necessary, has not only been available to the Court all through, but such a right is an irremovable one, and the said right has not been infringed in the least by the second proviso to clause (*a*) introduced by Act, CIV of 1976. When the Court fixed an upset price, the Court was not determining the rights of any of the parties before it, and the fixation of the upset price was only for facilitating the conduct of the sale and, at the same time, safeguarding the interests of the judgment-debtor by fixing a reserve price. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder had offered an amount higher than the upset price it would still be open to the judgment-debtor to approach the executing Court and adduce proof that the property had been sold for a low price on account of some material irregularity or fraud in the publicatian or conduct of the sale and have the sale set aside.

[*Para.* 39.]

Cases referred to:—

Kannianan v. *Chidambaram*, (1980) T. L. N. J. 33; *K. A. Raju* v. *Sivaprakasam*, (1979) T. L. N. J. 393; *Thiruvengadaswami* v. *Govindaswami*, A. I. R. 1927 Mad. 943; *S. K. Veeraswami Pillai* v. *Kalyanasundaram*, 106 I. C. 201 : A. I. R. 1927 Mad. 1009 (1); *Thiruvengadaswami Ayyangar* v. *Govindaswami*, (1928) I. L. R. 51 Mad. 655 : 27 L.W. 577 : 55 M. L. J. 363 : A. I. R. 1928 Mad. 503; *Srinivasan* v. *Andhra Bank Ltd.*, (1948) 2 M. L. J. 569 : 61 L. W. 852 : A. I. R. 1949 Mad. 398; *Rajarathinammal* v. *P. Kanakasabapathi Pillai*, (1955) 1 M. L. J. 285 : A. I. R. 1955 Mad. 720; *Kuppammal* v. *Devendra Iyer*, (1957) 2 M. L. J. 134 : 70 L. W. 493 (1); *Vellappa Naidu* v. *Venugopal Naidu*, (1957) 70 L. W. 815 : A. I. R. 1958 Mad. 423; *Subbiah* v. *Ramanathan*, (1957) 70 L. W. 989; *Kamalam Paul* v. *Rama Rao*, (1969) 1 M. L. J. 344; *B Susila* v. *Saraswathi Ammal*, (1970) 1 M L. J. 192 : 82 L. W. 627: A. I. R. 1970 Mad. 357; *Srirama* v. *T. V. A. China Rajanna*, (1972) 2 An. L. T. 52 : A. I. R. 1973 A. P. 24; *Suibo Raut* v. *Baban Raut*, (1908) I. L. R. 35 Cal. 353; *Khun Chauba* v. *Mahabir Chauba*, A. I. R 1948 All. 281; *Ram Ratan* v. *Mohan Lal*. A. I. R. 1967 All. 161; *Dulish Prasad* v., *Rajeswari Bibi*, A. I. R. 1977 All. 151; *D. I. F. Housing Co.* v. *Sarup Singh*, (1971) 1 S. C. J. 108 : (1970) 2 S.C R. 368: A. I. R. 1971 S C. 2324 ; *Subramaniam* v. *Raman*, (1967) 2 M. L. J 99 : I. L. R (1967) 2 Mad. 177 : A. I. R. 1967 Mad 232; *Sale Trustee, Loka Sikshana* v. *Commissioner of Income-tax*, (1976) 1 S. C. C. 254 : 101 I. T. R. 234 : 1976 Tax. L. R. 1 : (1976) 1 S. C. R. 461 A. I. R. 1976 S. C. 10; *Anandji Haridas & Co.* v. *Engineering Mazdoor Sangh (P) Ltd.* (1975) Tax. L. R. 479 : 99 I. T. R. 592: (1975, Lab I. C. 602 : A. I. R. 1975 S. C. 946; *Gajadhar Prasad* v. *Bakta Ratan*, (1973) 2 S. C. J. 570 : (1973) 2 S. C. C. 629 : A.I.R. 1973 S. C. 2593.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 29th February, 1980 and made in E. P. No. 333 of 1977 in O. S. No. 508 of 1974

V. Natarajan and *V. Nicholas*, Advocates, for Petitioners.

G. Venkataraman for *M/s. Aiyar and Dolia*, for Respondent.

The Order of the Court was made by

Ratnam, J.—The principal contention that has been raised in this civil revision petition at the instance of defendants 2 and 3 in O. S. No. 508 of 1978, Sub-Court, Coimbatore, is that in the course of the execution proceedings, the executing Court has no power to fix the upset price for the sale of the properties and consequently, no power as well to reduce the same. In support of this contention, the learned Counsel for the petitioners strongly relies upon the decision of Sathiadev, J., *Kannianan and another* v. *Chidambaram, Finance Corporation*[1]. On the other hand, the learned counsel for the respondent/decree-holder contends that even after the amendment of Order 21, rule 66, Civil Procedure

1. (1980) T.L.N.J. 33.

Code by Act CIV of 1976, there is no interdict laid on the Court in fixing the upset price and that the mere fixation or reduction of the upset price cannot be said to be in any manner prejudicial to the judgment-debtor and in any event, that cannot be a material irregularity in the exercise of its jurisdiction by the executing Court, which would justify interference by this Court in the exercise of its powers under section 115 of the Code of Civil Procedure. In this context, considerable reliance is placed on the judgment of Nainar Sundaram, J. *K. A. Raju* v. *Sivaprakasam and others*[1]. It may also be noticed that earlier Sathiadev, J., in C. R. P. No. 1277 of 1977 dated 22nd June, 1978, accepting the contention that the fixation of a low upset price as in that case was liable to misguide the purchasers, held that the amended provision of the Civil Procedure Code does not contemplate the fixation of upset price as has been hitherto done and directed that the sale should be on a proclamation strictly in accordance with the provisions contained in Order 21, rule 66, Civil Procedure Code. Again the same learned Judge in C R. P. No 1127 of 1978, dated 27th July, 1978, has taken the view that the provisions of Order 21, rule 66, Civil Procedure Code as they now stand, do not contemplate the fixation of any upset price by the executing Court. On the other hand, Ramanujam, J., in C. R. P. No. 163 of 1979 dated 12th February, 1979 in dealing with an objection that no upset price need be fixed by the executing Court held that merely because the fixation of upset price is not a necessity, such fixation would not automatically invalidate the order directing the sale of the property. However, Nainar Sundaram, J., in Civil Revision Petition No. 1536 of 1979, dated 31st August, 1979, after referring to the earlier cases, held that the judgement-debtor cannot have any grievance over the fixation of the upset price fixed by the Court before directing the sale of the properties even after the amendment of the provisions of the Civil Procedure Code by Act CIV of 1976. In a more recent judgment, Sathiadev, J., in Civil Revision Petition No. 2791 of 1979 dated 9th January, 1980, while examining the question whether in spite of the amendments effected by Act CIV of 1976, rule 199 of the Civil Rules of Practice still preserved the power of the Court to fix the upset price, reiterated that there is no obligation on the part of the Court to fix the upset price after Act CIV of 1976, but that if the upset price is found in a sale proclamation, it is a redundant factor and it is only an irregularity and not an illegality as to vitiate the Court auction sale. However, the learned Judge has also observed that if such a fixation had been done, it need not be persisted in the further conduct of the sale. Ultimately, however, the learned Judge set aside the order reducing the upset price and the property was directed to be brought to sale immediately.

2. Having regard to the diversity of views expressed in the decisions above referred and the importance of the question which is a matter of every day occurrence in the course of execution before the subordinate Courts, it is desirable and even necessary that the matter should be dealt with by a Bench so that an authoritative prouncement in this regard may be available for guidance to the Subordinate Courts.

3. The papers are, therefore, placed before my Lord the Chief Justice for orders regarding the posting of the matter before a Bench.

4. This Civil Revision Petition having been posted before a Bench in pursuance of the order of the High Court dated 7th July, 1980 and made herein and coming on for hearing on Monday 28th July, 1980. Tuesday 29th July 1980, Thursday 31st July, 1980 and upon hearing the arguments.

V. Natarajan and *V. Nicholas*, Advocates, for Petitioners.

G. Venkataraman for *M/s. Aiyar and Dolia*, Advocates, for Respondent

1. (1979) T. L. N. J. 393.

The Order of the Court was made by

Natarajan, J.— This Civil Revision Petition has come before us pursuant to a reference made by Ratnam, J., that the matter may be dealt with by a Bench for having an authoritative pronouncement on the question enunciated below :

> Whether an executing Court has no power to fix the upset price for the sale of property and consequently, no power as well to reduce the same ?

6. The contention of the revision petitioners is that the executing Court has no power to fix the upset price and hence it has no power also to reduce the same. Ratnam, J., noticed that such a contention has been upheld by Sathiadev, J. in *Kannaiyan and another* v. *Chidambaram Finance Corporation, Chidabaram*[1], *Betha Goundar* v. *K. K. Dharmasubramania Iyer*[2] and *Kamadhenu Bailings and another* v. *Secretary, Guruvayur Temple Renovation Committee, Kerala*[3]. The referring Judge also noticed that Ramanujam, J. in *M. Ramaswami Gounder and others* v. *R. K. Subramania Iyer*[4] and Nainar Sundaram, J, *K. A. Raju* v. *N. Sivaprakasam and others*[5]. have taken a contrary view and held that the fixation of upset price would not automatically invalidate the order directing the sale of the property and that even after the amendment of Order 21, rule 66 of the Code of Civil Procedure, by Act CIV of 1976, the power of the executing Court to fix the upset price, in appropriate cases, is not taken away. It is with regard to the diversity of views expressed in the decisions referred to above, the learned single Judge directed the papers to be placed before the Hon'ble Chief Justice for referring the matter to a Bench and that is how the matter is before us.

1. C. R. P. No. 2791 of 1979, dated 9th January 1980. (1980) T. L. N. J. 33.
2. C.R.P. No. 1277 of 1977, dated 22nd June, 1978.
3. C.R.P. No. 1127 of 1968, dated 27th July, 1978.
4. C.R.P. No. 1637 of 1979 dated, 12th February, 1979.
5. C. R P. No. 1536 of 1979, dated 31st August, 1979.

7. Mr. V. Natarajan, learned counsel for the petitioners besides bringing to our notice the orders of Sathiadev, J., and certain other decisions, also laid emphasis on the amendment made to Order 21, rule 66, Civil Procedure Code by Act CIV of 1976. Mr. G. Venkataraman, learned counsel for the respondents, countered the arguments of Mr. Natarajan by relying on a catena of decisions including those of Ramanujam, J. and Nainar Sundaram, J., referred to above, in which a different view has been taken.

For a proper understanding of the controversy, it is necessary to refer to Order 21, rule 66 (2) of Code as it originally stood and the changes made by several amendments besides the pronouncements of Courts from time to time. Originally, rule 66 (2) of Order 21, read as follows :

> "(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale and specify as fairly and accurately as possible :
>
> (*a*) the property to be sold (or where a part of the property would be sufficient to satisfy the decree, such part);
>
> (*b*) the revenue assessed upon the estate or part of the estate where the property to be sold is an interest in an estate or any part of an estate paying revenue to the Government ;
>
> (*c*) any incumbrance to which the property is liable;
>
> (*d*) the amount for the recovery of which the sale is ordered; and
>
> (*e*) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property."

On the terms of the rule as set out above, the following judgments were rendered :

"A Court undertaking to give valuation, which would be a real guide to a bidder even if it did not inspect the property itself, would, at any rate, have to accumulate copious data and hold an elaborate enquiry. The law requires that the Court, as fairly and accurately as possible, shall state anything which the Court considers material for a purchaser to know. If it considers a fair and accurate report of the value given by three persons material for the purchaser and nothing more in that particular respect, the Court will not have erred".

Thiruvengadaswami v. *Govindaswami*[1]:

"The omission to state the value of the property is not a material irregularity. When the decree-holder and the judgment-debtor differ hopelessly as to the probable value of the property, a statement as to the value by the Court is at best a guess and the Court, may, in the circumstances of a particular case, consider it better to abstain from such guess".

S. K. Veeraswami Pillai v. *Kalyanasundaram and others*[2] :

"Under Order 21, rule 66 of the Civil Procedure Code, the Court is under no obligation whatever to fix, and state in the proclamation of sale, its own valuation of the property to be sold.

Where the Court, without its determining the market value of the property to be sold and stating it in the sale proclamation ordered that the valuations of the decree-holder and of the judgment-debtor as well as that of the Commissioner appointed in the case, should be mentioned in the sale proclamation,

Held, that there was no irregularity".

Vide *Thiruvengadaswami Ayyangar* v. *Govindaswami Udayar*.[1]

9. The *Ratio decidendi* in these cases was to the following effect : A Court's valuation may be a real guide to a bidder, but such valuation should be fair and accurate as far as possible ; even in such cases, where the valuations of the decree-holder and the judgment-debtor differed from each other hopelessly, the Court was not bound to state its valuation of the property, since such a statement would at best be a guess and, depending upon the circumstances of a case, the Court any prefer to abstain from making a guess; the Court was under no obligation to fix its own valuation of the property and state it in the proclamation of sale.

10. By Dis. No. 691 of 1935 a change was made in this State to the Rule and sub-rule (2) (*a*) was added. Consequent on that, the old clause (*a*) became clause (*f*). Clauses (*e*) and (*f*) of sub-rule (2), which alone require mention, read as follows :-

"(*e*) the value of the property as stated :

(i) by the decree-holder ; and

(ii) by the judgment-debtor ; and

(*f*) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property".

There was again an amendment by means of P. Dis. 152 of 1963 to sub-rule (2) of rule 66. But, as the amendment has no relevance for the debate on hand, we refrain from extracting it.

11. As a consequence of the newly added clause (*e*) it became incumbent on Courts to

1. A I. R. 927 Mad. 943.
2 (1928) 106 I.C. 201: A.I.R. 1927 Mad. 1009(1).

1. (1928) I. L. R. 51 Mad. 655 : 55 M. L J. 363: A. I. R. 1928 Mad. 503.

set out in the proclamation of sale the value of the property as stated (*i*) by the decree-holder and (*ii*) by the judgment-debtor.

12. The positon of law, after amendment in 1936, was construed in the following cases:

13. In *Srinivasan* v. *Andhra Bank Limited*[1] Govinda Menon, J., held that it was not incumbent upon the Court to undertake an enquiry and take evidence about the value of the property and insert the value in the proclamation of sale, but even so, the Rule did not prevent the Court, if it thought necessary, from including the market value of the property as decided by it.

14. In *Rajarathinammal* v. *P. Kanakasabapathi Pillai*[2] Mack, J. held, on the facts of that case having regard to the wide divergence between the decree-holder's valuation and the judgment-debtor's valuation, it was desirable that the executing Court had the property valued by an amin and had the valuation inserted in the sale proclamation.

15. In *Kuppammal* v. *Devendra Iyer*[3] the Subordinate Judge had committed the error of fixing the upset price of the properties to be sold at Rs. 52,000 given by the defendants as well as at Rs. 5,000 given by the plaintiff. While setting aside the order of the Court below. Ramaswami Gounder, J., relied on *Srinivasan* v. *Andhra Bank Ltd.*,[1] and held that under Order 21, rule 66 (2) (*e*), Civil Procedure Code, it was enough if the Subordinate Judge had mentioned both the figures in the sale proclamation without fixing any upset price.

16. Again, the matter was considered by P. N. Ramaswami, J., in *Vellappa Naidu* v. *Venugopal Naidu*[1] and the learned Judge, after referring to the several cases decided earlier, summed up as follows:

> 17. "To sum up, after the amendment of Order 21, rule 66, Civil Procedure Code, it is now settled law that the Court is under no obligation to notify an upset price of its own. In fact, in many cases, it would not even be desirable for the Court to do so. The obligation of the Court is to state the valuations given by the decree-holder and the judgment-debtor. But, they must not be notified as upset prices. The Court when ordering the sale with two valuations noted which are discrepant, must adopt one of two courses. If it is desirable in the circumstances of the case for the Court to fix in a rough and ready way the upset price of its own, it can do so, because the amended provision does not prohibit the Court from fixing its own upset price. But, where the Court does not desire to fix even in a rough and ready way its own valuation, it will be perfectly within its rights in refraining from doing so, and this cannot be canvassed either by way of appeal or revision. But, it will instruct the selling officer, either in general or in each case, to begin the sale with the higher of the two valuations as upset price and, if no bidders are forthcoming to go on lowering the upset price and when the lower of the two valuations, is reached, to start again with the lower valuation, as otherwise, our not incorruptible Nazirs deputed as selling officers will have to evolve an upset price of their own and which is most undesirable."

18. In *Subbiah* v. *Ramanathan*[2] Panchapakesa Ayyar, J. held independently, without referring to the earlier decisions, that there is no illegality as such in a Court fixing its own upset price, but nevertheless, it would be desirable for the Court to fix the upset price where widely divergent upset prices as given by the two sides.

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1. (1948) 2 M. L. J. 569 : 61 L. W. 852 : A. I. R. 1949 Mad. 398
2. (1955) 1 M. L. J. 285 : A. I. R. 1955 Mad. 720.
3. (1957) 2 M. L. J. 134 : 70 L. W. 493 (1).

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1. (1957) 70 L. W. 815 : A. I. R. 1958 Mad. 423.
2. (1957) 70 L. W. 989.

19. In *Kamalam Paul* v. *Rama Rao*[1] Alagiriswami, J. held as below :

"There is no doubt that no auction can be held without an upset price being fixed. Otherwise, it will only become a Dutch auction.........Without an upset price being fixed, it is not possible to hold an auction at all. Otherwise, only the judgment-debtor will suffer.........After all, upset price only represents the price below which the Court is not prepared to accept offers for the property. Even though the upset price may be fixed at Rs. 20,000 there is no objection to any purchaser buying the property for Rs. 50,000 which is the value given by the judgment-debtor or even for more."

20. The question came up in a slightly different form for consideration before Ismail, J. (as he then was), in *B. Susila* v. *Saraswathi Ammal*[2]. The contention put forward was that the executing Court was under a bounden duty to give notice to the judgment-debtor before any reduction in the upset price was made. While repelling this contention, the learned Judge held as follows :

"I may straightaway point out that under Order 21, rule 66, Civil Procedure Code, as amended by this Court, there is absolutely no provision for the Court to fix any upset price and all that the rule requires the Court to do is to mention the valuation of the property as given by the decree-holder as well as by the judgment-debtor. It is open to the Court, if the circumstances of the case justify, to arrive at its own valuation and fix the upset price, but the Court is under no obligation under the statute to fix the upset price. Therefore, when the Court fixes the upset price or modifies either by way of enhancement or reduction of the upset price originally fixed, it cannot be said that the Court is acting pursuant to the obligation imposed upon it under Order 21, rule 66 Civil Procedure Code..........................

When the Court fixed the upset price in a sale proclamation, the Court is not determining the rights of any of the parties before it and the fixation of upset price may be an indication of the probable price which the property may fetch from the point of view of the intending bidders ; but it is not binding either on the decree-holder or the judgment-debtor or even on the Court. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder has offered an amount higher than the upset price, it is still open to the judgment-debtor to go before the Court and allege that the property has not fetched the proper price ; and he can have the sale set aside, if he can establish that the inadequacy of the price is the result of material irregularity or fraud in the publication or the conduct of the sale. Consequently, the fixation of the upset price by the Court, does not affect the rights of any of the parties, and it is not, therefore, open to the judgment-debtors to contend that, independent of Order 21, rule 66, Civil Procedure Code, they are entitled to notice to an application filed by the decree-holder for reducing the upset price."

21. In *Srirama* v. *T. V. A. China Rajanna*[1]. A Division Bench of the Andhra Pradesh High Court relied on the dictum contained in *Srinivasan* v. *Andhra Bank Ltd*[2]. *Rajarathinammal* v. *P. Kanakasabapathi Pillai*[3] and *Kuppammal* v. *Devendra Iyer*[4] and held that the executing Court is not bound to fix an upset price even when there is a wide disparity between the value given by the judgment-debtor and the decree-holder, but nevertheless, the Court is not prevented, in

1. (1969) 1 M. L. J. 344.
2. (1970) 1 M.L.J. 192 : 82 L. W. 627 : A. I. R. 1970 Mad. 357.

1. (1972) 2 An. L. T. 52 : A. I. R. 1973 Andhra Pradesh 24.
2. (1948) 2 M.L.J. 569 : 61 L. W. 852 : A. I. R. 1949 Mad. 298.
3. (1955) 1 M.L. J. 285 : A. I. R. 1955 Mad. 720.
4. (1957) 2 M.L.J. 134 : 70 L.W. 493. (1).

appropriate cases, from indicating the approximate value of the property; that where there is wide disparity in the value given by the decree-holder and the judgement-debtor it is not only desirable, but fair and proper for the executing Court to ascertain the approximate value of the property through a Commissioner or an amin and incorporate the same in the sale proclamation and that the fixation of two upset prices by the Court is not permissible.

22. In the year 1972, sub-rule (2) of rule 66 of Order 21, was amended in this State by P. Dis. No. 349 of 1972 and clause (D-1) was inserted in sub-rule (2) and the amended rule read as follows: "(d-1) the upset price fixed by the Court," As a result of this amendment, the petition was that, so far as this State is concerned, the executing Court had to incorporate in the proclamation of sale, not only the value of the property as given by the decree-holder and the judgment-debtor, but also the upset price fixed by it. Obviously the amendments had been made to give effect to the pronouncements by this Court in several cases that though the statute did not impose any obligation on the Court to give its own value of the property in the sale proclamation, the Court was nevertheless free to exercise its powers, in appropriate cases, and make its own estimate of the value of the property and have that figure incorporated in the sale proclamation in addition to the figures given by the decree-holder and the judgment-debtor, and, further more, such an exercise appeared to be indispensable when the estimates given by the decree-holder and the judgment-debtor disclosed a case too bewildering to be comprehended by the intending bidders. Thus, the Courts were enjoined to fix the upset price and mention it in the sale proclamation besides setting out the values given by the parties themselves, the decree-holder and the judgment-debtor.

23. After the introduction of clause (d-1), Ismail, J. (as he then was) had to consider in *S.N. Shamsuddin* v. *M. K. Poyyamani*[1] whether the execution, Court, while executing its powers under clause (d-1), was under an obligation to give notice to the judgment-debtor before reducing the upset price originally fixed by it. The learned Judge held that inasmuch as the fixation of upset price was a statutory performance, the Court had perforce to give notice to the judgment-debtor before making any reduction in the upset price.

24. When matters stood thus, Central Act (CIV of 1976) brought about further amendments to rule 66 by introducing the following proviso:

> "Provided that where notice of the date for settling the terms of the proclamation has been given to the judgement-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:
>
> Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties."

25. We are concerned, in these proceedings, only with the second proviso, since it is with reference to its terms, the petitioners herein contend that not only has clause (d-1) been superseded, but an interdict has also been placed on the executing Court to fix the upset price for properties brought for sale in Court auction.

26. The argument of Mr. Natarajan, counsel for the petitioners, ran thus: Order 21, rule 66, Civil Procedure Code provides how a proclamation of sale should be made and what essential particulars the proclamation of sale should contain. Clauses (*a*) to (*e*) of the rule enunciate the particulars that should necessarily be incorporated in the proclamation of sale. The second proviso, newly introduced by Act CIV of 1976 expressly provides that nothing in the rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the

1. C. R. P. No. 1484 of 1973 dated 24th August, 1973.

value of the property. The proviso, should, therefore, be construed in one of the following manners, namely: (1) it must be taken as a proviso specifically carving out the provision from the earlier clauses (*a*) to (*e*); or (2) the proviso should be taken as a separate and independent rule by itself as there is no repugnency between it and clauses (*a*) to (*e*) of rule 66 (2) ; or (3) the proviso has to be of taken as an explanation of the scope of clauses (*a*) to (*e*) and, in that sense, the proviso contains a mandate forbidding the Court from entering its own estimate of the value of the property in the sale proclamation.

27. The repeated contention of the petitioners' counsel was that the words, "provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property" should be construed to mean that the Court had no discretion or power in the matter and the Court stood completely deprived of its power to enter its own estimate of the value of the property even if the estimates given by the decree-holder and the judgment-debtor were poles apart and the officer of the Court conducting the auction sale had no guidance whatever about the price at which the auction should be commenced, except the widely divergent prices given by the decree-holder and the judgment-debtor. By way of support for his argument, reliance was placed by the learned counsel on the second limb of the proviso which places on the Court an inescapable obligation to set out in the sale proclamation the estimates given by either or both of the parties, the relevant words in the proviso running as under :

> "but the proclamation shall include the estimate, if any, given, by either or both of the parties".

28. The rule should be construed, according to learned counsel, in conformity with the principles evolved by Courts of law and jurists which have found universal acceptance. The rules are as follows :

> "The golden rule for the interpretation of Acts is to consider the plain meaning of the words used ..... The Court cannot proceed on the assumption that the Legislature has made a mistake. Even if there is a defect, it is not for the Court to add or amend the words of a Statute or to supply when the language is clear, it is the duty of the Court to give effect to it without calling in aid outside considerations to ascertain the intentions of the Legislature ... Statutory provisions cannot be whittled down by general principles of equity, justice and good conscience. Nor can they be avoided on ground of hardship or inconvenience when the meaning is clear on the face of the statute, nor is the Court concerned with the motive of Parliament in enacting the statute or its wisdom ..... In interpreting the provisions of the Statute, that construction should be adopted which would be given effect to all parts thereof and would not render any of them meaningless or inoperative." Vide: Mulla on the Code of Civil Procedure, 13th Edn., pages 2 and 3.

In this connection, the Petitioners' counsel also invited our attention to the following passage occurring in *Suibn Raut* v. *Baban Raut*[1]

> Lord Davey further observed that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction."

29. On the assumption that the proposition of law propounded by him was the correct one and that no other interpretation can be given. Mr. Natarajan, built up his further arguments to say that the Court below had committed an illegality in exercising jurisdiction not vested in it and such wrongful assumption and exercise of jurisdiction vitiated the impugned order and consequently, this Court should exercise its powers

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1. (1908) I. L. R. 35 Cal. 353.

under section 115, Code of Civil Procedure, and revise the impugned order. We may usefully set out, at this juncture, what the order of the Court below is. It reads as follows:-

> "Upset price reduced in E. A. No. 201 of 1980 to Rs. 3,00,000 for Lot I and Rs. 75,000 for Lot II. proclaim and sell 30th April, 1980.

Further hearing 16th June, 1980 (Batta and copies in a week)."

By way of authority for the latter argument, the petitioners' counsel placed reliance on the following cases : *Khun Khun Chauba* v. *Mahabir Chauba*[1], *Ram Pratan* v. *Mohan Lal*[2], *Dulish Prasad* v. *Rajeswari Bibi*[3], and *D. I. F, Housing Co.* v. *Sarup Singh*[4]. The dictum in these cases is to the following effect : "The words, "illegally" and "with material irregularity" as used in this clause (clause (*e*) of section 115, Civil Procedure Code), do not cover either errors of fact or of law ..... The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision."

30. Having set out the case law on the subject prior to the change brought about by Act CIV of 1976 to rule 66 as well as the contentions of the petitioners' counsel as to how the second proviso to clause (*e*) should be construed and that the action of the Subordinate Judge in fixing the upset prices for the two lots of properties and subsequently to bring reduction in the upset prices amounted to exercise of powers without jurisdiction, we will now examine the matter in its full perspective. Rule 66 (2) as it orginally stood did not contain any clause relating to the setting out of the value of the property either as given by the parties or as estimated by the Court. Notwithstanding the absence of any such provision, it was held in *Thiruvengadaswami Ayyangar* v. *Govindaswami Udayar*[1], which was considered a leading authority, that since the reserve price is also generally fixed by the Court, there was no obligation for the Court to fix its own valuation of the property and incorporate it in the sale proclamation. After the amendment in 1936, when a new clause was introduced numbered as clause (*a*), the Court was enjoined to set out the value of the property as stated by the decree-holder and the judgment-debtor. But no reference was made to the powers of Court to set out its own value of the property or its powers to fix the upset price. It was held in one set of cases, *viz.*; *Srinivasan* v. *Andhra Bank Ltd*[2] and *Kuppammal* v. *Devendra Iyer*[3] that the Court was not obliged to estimate the value of the property and mention it in the sale proclamation, but the rule did not inhibit the Court from exercising its powers in those cases where it considered such a course was necessary, and in another line of cases. *viz.*; *Rajarathinammal* v. *P. Kanakasabapathi Pillai*[4], *Yellappa Naidu* v. *Venugopal Naidu*[5] *Subbiah* v. *Ramanathan*[2] and *Kamalam* v. *Rama Rao*[7], that notwithstanding the Court being under no obligation to estimate the value of the property it would be desirable, and even necessary, for the Court to make its own valuation of the property and fix the upset price as, otherwise, the auction may turn out to be a Dutch auction and the judgment-debtor would be the loser in the bargain. As making an estimate of the value of the property by the Court was a matter of discretion for the Court, Ismail, J., (as he then was), held in *B Susila* v. *Saraswathi Ammal*[8] that the fixation of

1. A. I. R. 1948 All. 281.
2. A. I. R. 967 All. 161.
3. A. I. R. 1977 All. 151.
4. (1971) 1 S. C. J: 108: (1970) 2 S. C. R. 368 : A. I. R. 1971 S. C. 2342.

1. I. L. R. 41 Mad. 655.
2. (1948) 2 M. L. J : 569 : A.I.R. 1949 Mad. 398.
3. (1957) 2 M. L. J. 134 :70 L. W. 493.
4. (1955) 1 M. L. J. 285 : A. I. R. 1955 Mad. 720.
5. (1955) 70 L. W. 815 : A. I. R. 1958 Mad. 423.
6. (1957) 70 L. W. 989.
7. (1969) 1 M. L. J. 344.
8. (1970) 1 M. L. J. 192; 82 L. W. 627: A. I. R. 1970 Mad. 357.

the upset price and any reduction of it subsequently, was in the nature of an administrative action and therefore, notice need not be given to the judgment-debtor before the Court reduced the upset price. Then came to be incorporated, clause (d-1) in this State, and a duty was cast on the Court to fix the upset price and mention that also in the proclamation of sale besides the valuations given by the decree-holder and the judgment-debtor. The fixation of upset price, therefore, became a judicial act and consequently, the requisite formalities had to be observed by the Court before reducing the upset price, *viz.*, it had to give notice to the judgment-debtor and hear him, if be cared to appear, before reducing the upset price. Thus, it may be seen that even before the introduction of clause (d-1) this Court had never doubted the powers of an executing Court to make its own estimate of the value of the property if deemed fit and include it in the sale proclamation. What has now to be looked into is whether by reason of the amendment brought about to rule 66 by Act CIV of 1976, particularly by the introduction of the second proviso, the power of the executing Court "to enter in the proclamation of sale its own estimate of the value of the property" has been taken away.

31. Before we go into that question, we must point out the difference between the value of a property and the upset price for a property brought for sale in Court auction. The word 'value' means as follows: "to estimate or appraise as being worth a specified sum or amount; to estimate the value of goods, property etc , ; to appraise in respect of value, to estimate or regard as having a certain value or worth." (Vide Shorter Oxford Dictionary (Illustrative), Volume 2). On the other hand, the term 'upset', in relation to price, means as follows: "stated as the lowest sum for which property exposed to auction will be sold: named as the sum from which bidding may start." (Vide: Shorter Oxford Dictionary, (Illustrative), Vol. 2). The same term means' according to the Concise Oxford Dictionary (III Edn.), "lowest selling price of property in auction; reserve price" and, according to the Chamber's Twentieth Century Dictionary, "the lowest that will be accepted, at which bidding is started." From the meanings given above, it may be seen that the words, "value" and "upset price" are not synonymous, but have entirely different meanings. Unfortunately, this distinction has not been noticed, and in several cases, the word "value" has been used with reference to upset price. The misuse of the word has afforded scope for the decree-holders in certain cases to contend that the Court must exercise its powers and give its own value of the property, meaning there by that the Court must fix an upset price for the property, and the judgment-debtors in certain cases, to contend that the Court had no power to fix the upset price meaning thereby that the Court had no authority to make its estimate of the value of the property and include it in the sale proclamation.

32. The word, "upset price" means reserve price. Auction sales could be of two kinds, *i. e*, without reserve or subject to a reserve price. In the olden days in England, puffers were employed in order to prevent a sale at an undervalue. The common law did not approve the engagement of puffers while the Courts of equity gave limited recognition to the employment of puffers. But, eventually by enacting the Sale of Land by Auction Act, 1867, the system of employing puffers was done away with. The following passage occurring in Williams on Title (Third Edition), at page 101, throws light on the matter:

> "*Reserve price* : A sale by auction may be either 'without reserve' or subject to a reserve price; but it must be clearly stated in the particulars or the conditions whether or not the sale is subject to a reserve price. If it is subject to a reserve price, it will also be necessary to reserve a right to bid, but that is better reserved as a separate right. The common law appears to have been a little severe on auctions, and did not allow the employment of a puffer *i. e.*, a person to bid in order to prevent a sale at an undervalue. Equity, on the other hand, allowed the employment of one puffer unless the sale was expressly stated to be without reserve; but a dispute

arising as to the precise rule in equity, the Sale of Land by Auction Act, 1867, was passed, and the common law rule prevailed in all cases. The result is that now the particulars or the conditions must state whether or not the sale is without reserve or whether a right to bid is reserved".

33. Bearing in mind this distinction between the value of a property and the fixation of upset or reserve price for a property brought for sale in Court-auction, let us examine the contention of the petitioners that the second proviso to rule *(e)* contains an express prohibition on the Court from estimating the value of the property and including it as a relevant particular in the proclamation of sale.

34. In the objects and reasons given for enacting Act CIV of 1976, clause 75, sub-clause *(xxvi)* relating to the amendment to rule 66 of Order 21 reads as follows :

"Certain difficulties have been caused on account of the mistake occurring in the estimated value of the property as stated in the proclamation of sale. Rule 66 is being amended to provide that the Court should state merely the value estimated by the parties and should not vouch for the accuracy of such value".

We are not taking into aid the statement of objects and reasons for construing the words found in the second proviso, but are only referring to it to set out the back-drop in which the amendment was made. In this connection, we may refer to the ratio in two cases setting out the circumstances in which a reference could be made with advantage to the statement of objects and reasons appended to a Bill. The first is *Subramanian* v. *Raman*[1], where it is stated as follows :

"The objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. But the statement of objects and reasons set out the circumstances prevalent at the time of the introduction of the Bill, a back-drop that could high-light ambiguous expressions in the Act."

The other case is *Sale Trustee, Loka Sikshana Trust* v. *Commissioner of Income-tax*[1] wherein the following observations of the Supreme Court in *Anandji Haridas and Company (Pvt.) Limited* v. *Engineering Mazdoor Sangh*[2], have been extracted :

"As a general principle of interpretation where the words of a statute are plain precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."

It is apposite to mention here that before Act CIV of 1976 was passed, some of the High Courts in India, such as the Orissa High Court and the Patna High Court, had incorporated a proviso as under to sub-clause *(e)* of sub-rule (2) of rule 66:

1. I. L. R. (1967) 2 Mad. 177, 195: (1967) 2 M.L.J. 99: A.I.R. 1967 Mad. 232.

1. (1975) 101 I. T. R. 234 253 : 1976 Tax. L. R. 1: (1976) 1 S C.C. 254: (1976) 1 S.C.R. 44: A.I.R. 1976 S.C. 10.
2. (1975) 99 I. T. R. 592, 595: 1975 Tax. L. R. 479: (1975) Lab. I. C. 602 : A.I.R. 1975 S. C. 946.

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively *together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation.*"
(Italics supplied).

Viewed in this background, it may be perceived that the Legislature only wanted to ensure that the Court did not vouch for the accuracy of any value of the property entered in the sale proclamation, and not that the Court should not fix an upset price of reserve price at which the auction should commence for the sale of the property.

35. In the course of his arguments, Mr. Natarajan invited our attention to the pronouncement of the Supreme Court in *Gajadhar Prasad* v. *Bhakta Ratan*[1], and argued that the dictum in that case lends force to his contentions. The relevant portion referred to by the counsel reads as follows :

"A review of the authorities as well on the amendments to rule 66 (2) (*c*) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept merely the *ipso-dixit* of one side. It is certainly not necessary for it to state its own estimate. If this were required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse biddars. It may also be quite misleading if the Court's estimate is erroneous. Moreover, rule 66 (2) (*e*) requires the Court to state only the facts it considers material for a purchaser to Judge the value and nature of the property himself. Hence, the purchaser should be left to Judge the value for himself".

We do not find any support for the petitioners' contention in the decision referred to above. That was a case where the Court had failed to perform its duty under Order 21, rule 66 (2) (*e*) *viz.*, giving the material and relevant particulars about the property. Even the area of the compound in which the two bungalows brought for sale in that case were situated, was not mentioned in the sale proclamation. There was also no mention whether the bungalows which were separately valued were to be sold as one or two items of property. The sale proclamation contained several such irregularities. Moreover, the executing Court had practically accepted, as its own valuation, without indicating reasonable grounds for its preference, whatever the decree-holders had asserted about the value of the property. The Court did not even bother to consider the objections raised by the judgment-debtors. It was in such circumstances, the Supreme Court laid down how a Court should fulfil its obligation under clause (*a*) of rule 66 (2). The decision does not lay down that the Court is debarred from making its own estimate of the value of the property or fixing the upset price at which the property should be sold.

36. We have already pointed out the difference in meaning between the words "value" and "upset price or reserve price". What the proviso in question lays down is that in a proclamation of sale the estimate of the property, as given by either or both the parties, should necessarily find a place. But, no duty was cast on the Court to enter in the sale proclamation its own estimate of the value of the property. The reason for the Legislature having worded the proviso in the manner done is not far off to see. The Court making an estimate of the value of the property and entering it in the proclamation of sale would become necessary only when an upset price has to be fixed for the property. Since the Legislature has now made it obligatory that the estimate of the value of the property, as given by either or both the parties, should necessarily find a place in the proclamation of sale, the need for the Court to fix an upset price may not arise in all cases. The procedure indicated by P. N. Ramaswami, J., in *Yellappa Naidu*

1. (1973) 2 S. C.J. 570: (1973) 2 S. C. C. 629: A.I.R. 1973 S.C. 2593.

v *Venugopal Naidu*[1] can be resorted to, *i. e.*, the sale will have to commence at the higher price given by the judgment-debtor and, in the absence of bidders, the price will have to be progressively brought down till it reaches the figure given by the decree-holder and again raised up, depending upon the availability of bidders. If, in spite of such a procedure, the sale does not take place for want of bidders, then it is open to the Court, on the application of the decree-holder, to fix as upset price for the property at a rate as near as the property would be worth in the estimation of the Court. If, even then, the sale does not take place, the decree-holder can move the executing Court to reduce the upset price. It will be open to the executing Court to reduce the upset price or not, depending upon the circumstances of the case, and, if a reduction is to be made, to decide the extent to which the upset price should be reduced. It is only for these reasons, the Legislatuie should have enacted the proviso in two parts, the first part relating to the discretionary power of the Court to give its own estimate of the value of the property in the sale proclamation and the second part relating to the obligation of the Court to include in the sale proclamation the estimate, if any, given by either or both the parties. The first part of the proviso is in the negative and the second part, in the affirmative. The significance of the manner of drafting cannot be missed. The affirmative is used to give a mandate and the negative is used only to emphasize that the Court is not under a duty to enter its own estimate in the proclamation of sale. If it was the intention of the Legislature that the Court should, in no circumstances, give its own estimate of the value of the property, then the wording of the first part of the proviso would have been entirely different. The Legislature would have clearly mentioned that the Court was precluded from making its own estimate of the value of the property and that the proclamation shall not include the estimate, if any, made by Court.

37. In some cases, the Court may feel called upon, in the interest of justice, to enter in the proclamation of sale its own estimate of the value of the property. Take for example, a case where the judgment-debtor, for some reason, has not given his value of the property and only the decree holder has given his value and that value is grossly low. The proclamation of sale would then contain only the value as given by the decree-holder, and if the property is brought for sale, the bidding at the auction can start only at the rate given by the decree-holder and the property may be knocked off at the value given by the decree-holder or for a slightly higher amount. The result will be that the property may get sold for a very low price and the judgment-debtor would be the loser in the bargain. To avoid such a situation, the Court can certainly exercise its discretionary power under the first limb of the proviso and give its own estimate of the value of the property in the sale proclamation.

38. When property is sold in Court-auction the Court does not merely act as an auctioneer, but has also a duty to protect the interests of the judgment-debtor as well as the decree-holder. It is with referenee to this peculiar role, Rule 199 (2) of the Civil Rules of Practice has been framed. The said rule is in the following terms :

> "*Upset price* :—In cases in which the Court may consider that the applicant (decree-holder) should not be allowed to bid for less than a sum to be fixed, it shall be competent to the Court to give leave to bid at the sale, only on condition that the applicant (decreeholder's) bid shall not be less than the amount so fixed by the Court, which amount shall, as far as practicable be determined with reference to the probable market value of the property, or of the lot or lots into which the property is divided for sale."

When the decree-holder seeks leave of Court to bid at the auction, the Court may deem it necessary to fix the upset price of the property with reference to the probable market value of the property or the lots into which it may be divided for sale. It would be strange logic to say that the Court should step in to safeguard the interests of the

1. (1957) 70 L.W. 815 : A.I.R. 1958 Mad. 423.

udgment-debtor only in those cases where the decree-holder seeks leave of Court to bid at the auction and at other times, the Court need not concern itself with fixing an upset price for the property. If such a narrow view is taken, then the decree-holder can defeat the object underlying the rule by putting up a benamidar as the purchaser. Even as in the case of judgment-debtor, the Court has also to safeguard the right of the decree-holder by seeing to it that execution proceedings do not become abortive for want of bidders for purchasing the property at the highly boosted up rate given by the judgment-debtor.

39. We are therefore of opinion that the Court's power to fix an upset price for the property, which includes within it a right to reduce the upset price whenever necessary, has not only been available to the Court all through, but such a right is an irremovable one, and the the said right has not been impinged in the least by the second proviso introduced by Act CIV of 1976. Of course, as pointed out in *B. Susila* v. *Saraswathi Ammal*[1] when the Court fixes an upset price, the Court is not determining the rights of any of the parties before it, and the fixation of the upset price is only for facilitating the conduct of the sale and, at the same time, safeguarding the interests of the judgment-debtor by fixing a reserve price. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder has offered an amount higher than the upset price it will still be open to the judgment-debtor to approach the executing Court and adduce proof that the property has been sold for a low price on account of some material irregularity or fraud in the publication or conduct of the sale and have the sale set aside.

40. The reference will stand answered accordingly. In the light of our conclusion, it follows that the view taken by Sathiadev, J., in *Kannaiyan and another* v. *Chidambaram Finance Corporation, Chidambaram*[1], *Bathe Gounder* v. *K. R. R. Sharmasubramania Iyer*[2] and *Kamadhenu Buildings and another* v. *Secretary, Guruvayvur Temple Renovation Committee, Kerala*[3], cannot be held a sustainable one, and therefore, it will stand overruled. The view taken by Ramanujam, J., in *M. Ramaswami Gounder and others* v. *R. K. Subramania Iyer*[4] and Nainar Sundaram, J., in *K. A. Raju* v. *N. Sivaprakasam and others*[5], will stand approved.

41. In the instant case, the Court had already fixed the upset price and since no bidders were available, it has reduced the upset price for lots I and II. As we have held that the executing Court has the power to fix the upset price for sale of property and such power will include within it the power to reduce the upset price as well, the Court below has not committed any error of exercising a jurisdiction not vested in it or committed any illegality or irregularity in the exercise of jurisdiction vested in it. The revision will, therefore, stand dismissed, but with no order as to costs.

S. J. —— *Petition dismissed.*

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1. (1970)1 M.L.J. 192 : A. I. R. 1970 Mad. 357.

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1. C. R. P. No. 2791 of 1979 dated 9th January, 1980 (1980) T.LN.J. 33.
2. C R. P. No. 1277 of 1977, dated 22nd June. 1878.
3. C. R. P. No. 1127 of 1978 dated 27th July. 1978.
4. C.R.P. No. 163 of 1979 dated 12th February, 1979.
5. C. R. P. No. 1536 of 1976 dated 31st August, 1979.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :— *S. Padmanabhan, J.*

M/s. Sundaram Finance Ltd., represented by its Secretary and Chief Accountant, Madras-6 .... *Petitioner**

v.

The State of Tamil Nadu, represented by the Secretary, Department of Labour and Employment, Fort St. George, Madras-9 and another ... *Respondents.*

(A) *Tamil Nadu Shops and Establishments Act (XXXVI of 1947) and Notification No. 1088, Labour and Employment dated 26th December, 1976 — "Shop" — Definition — Sundaram Finance Limited, Madras — Whether a shop within the meaning of the notification.*

(B) *Statutes —Construction — Doubt to be resolved in favour of the beneficiary.*

If a word or section in a remedial statute is capable of two constructions that construction should be preferred which advances the policy and purpose of the Act and is more beneficial to those for whose benefit the Act may have been passed. If there is any doubt, the doubt should be resolved in favour of the beneficiary.

The liberal construction must flow from the language used. The Court ought not to place an unnatural interpretation on the words contained in an enactment. There is no presumption that protection of widest amplitude must be deemed to have been conferred upon those for whose benefit the legislation may have been enacted.

The rule does not militate against the plain meaning rule and has no application when two constructions are not fairly open and the words of the enactment are reasonably capable of only one construction. [*Para.* 2.]

Where the main part of the business activity of an establishment (petitioner) was the rendering of services to its customers by advancing moneys to purchase motor vehicles on hire purchase, the moneys being advanced on the security of the motor vehicles themselves such establishment is a shop within the meaning of the Notification No. 1088 dated 26th December, 1978. It is not necessary that the service should be personal service rendered in the premises of the establishment shop itself. [*Para.* 10.]

Cases referred to:—

Ram Chander v. *State*, A. I. R. 1963 Punjab 148; *Public Prosecutor* v. *Shanmugam Pillai*, (1960) M. W. N. 265: (1959) 2 Lab. L. J. 802.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order NS-51-18607-102 dated 10th/21st January, 1978 of the 2nd respondent herein, *viz.* The Regional Director, Employees State Insurance Corporation, Madras passed against the petitioner herein and quash the same.

A. Devanathan, for Petitioner.

D. Krishnan, for the Government Pleader and *Radha Srinivasan*, Additional Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER.—The question that arises for consideration in this writ petition is whether th, petitioner, M/s. Sundaram Finance Limited-Madras, is a 'shop' within the meaning of the Notification No. 1088, Labour and Employment dated 26th December, 1976 (hereinafter referred to as the Notification). Mr. Devanathan strenuously contended that the word 'shop' would not take in establishments like M/s. Sundaram Finance Limited which are purely commercial establishments. The learned counsel drew my attention to the definition of the word 'shop' in the Tamil Nadu Shops and Establishments Act, 1947

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*W. P. No. 700 of 1978.

10*th October*, 1980.

which definition excludes commercial establishment from its ambit. He also referred to certain dictionaries as regards the meaning of the word 'shop'.

2. In *New India Maritime Agencies Private Limited, Madras* v. *The Government of Tamil Nadu and another*[1] I have had occasion to consider the scope and width of the expression 'shop' as used in the Notification. In that case, the question arose whether the office of certain steamship agents who acted as shipping agents for booking cargo on behalf of foreign steamship companies, would fall within the meaning of 'shop' as found in the Notification. It was contended before me that the word 'shop' should be understood as a place where goods are normally bought and sold. After referring to the various decisions on the interpretation of welfare legislation it is observed as follows : "The following principles emerge from the above decisions. (1) In the construction of a social legislation the Courts ought to give the words or a section in the statute a liberal interpretation in order to see that the relief contemplated by the statute shall not be denied to the class intended to be relieved.

"If a word or section in a remedial statute is capable of two constructions that construction should be preferred which advances the poiicy end purpose of the Act and is more beneficial to those for whose benefit the Act may have been pass d. If there is any doubt the doubt should be resolved in favour of the beneficiary.

The liberal construction must flow from the language used. The Court ought not to place an unnatural interpretation on the words contained in an enactment. There is no presumption that protecrion of widest amplitude must be deemed to have been conferred upon those for whose benefit the legislation may have been enacted.

The rule does not milltate against the plain meaning rule and has no application when two constructious are not fairly open and the words of the enactment are reasonably capable of only one construction."

On a reference to the dictionary meaningof the word 'shop' as found in some of the standard dictionaries and two decisions of the Kerala High Court it was held that the word 'shop' has different shades of meaning and that it not only referred to a place where goods were sold, but also a place where services were rendered. Accordingly, it was held that the office of the shipping agents in that case was a shop falling within the micshief of the word 'shop' in the Notification.

3. Mr. Devanathan, canvassed the correctness of the decision in W. P. No, 4077 of 1977. The learned counsel drew my attention to the word 'shop' in some of the dictionaries. It will be sufficient to refer to the meaning given in one dictionary cited by Mr. Devanathan to show that the word shop has different shades of meaning and is not confined to a place where goods are stored and sold by retail dealers. In Mitra's Legal and Commercial Dictionary the meaning of the word 'shop' is given thus :

"*Shop*: Shop includes any premises where any retail trade or business is carried on including the business of a barber or hairdresser, and retail sales by auction, but excluding the sale of programmes, catalogues and other similar sales at theatres. Shop means any premises wnere goods are sold either wholesale or by retail or both whole-sale and by retail and includes a laundry, a hair cutting saloon and other places where services are rendered to customers. The ordinary meaning of the word shop is that it is a place where goods are stored and sold by retail dealers and not a stall or an open space."

4. In Random House Dictionary of the English Language, College Edition, page 1216, the meaning of the word 'shop' is given as follows :

"Shop (1) a retail store, espa. small one, (2) a small store or department in a large store selling a specific or select type of goods, (3) the workshop of a craftsman or artisan, (4) any factory, office or business, (5) one's trade, profession or

1. W. P. No. 4077 of 1977.

business as a subject of conversation or preoccupation".

5. From the above, it is clear that as already observed in W. P. No. 4077 of 1977 the word shop has different shades of meaning and includes even an office or a place of business.

6. Mr. Devanathan cited the decision in *Ram Chander* v. *State*[1]. I am unable to see how the said decision in any way supports the learned counsel. There the matter arose under the Punjab Shops and Commercial Establishments Act. The petitioner in that case was a salesman of a tea company. The company had taken on rent a godown where tea was stocked. This depot was a part so to say of the entire business activity of the company. Its function was to act as a Store-house for the goods and the keeping of necessary books for the purpose. The books could be written at the depot or by the sales-man at home. No sale of goods took place at the depot nor the depot was used in connection with a shop. No services were rendered to any one or more customers. At best the depot was a godown-*cum*-office and the depot-holder was marely an employee of the company. In these circumstances, the question arose whether the depot was a commercial establishment. Head Note B to the decision reads as follows : "One element is common to both the expressions 'shop' and 'commercial establishment', namely, that there have to be premises wherein, in the case of a commercial establishment any business, trade or profession is carried on for profit and in the case of a shop where any trade or business is carried on or where services are rendered to customers. The carrying on of trade or business or profession necessarily has to have a close and intimate connection with the premises. The other requirement is that what should be carried on in those premises is trade or business or rendering of services to customers in the case of a shop, and in the case of a commercial establish-ment a trade or business or profession has to be carried on for profit. If the element of rendering service is eliminated, the remain-ing two elements, that is carrying on of trade of business are common both to a shop as well as to a commercial establish-ment. But a shop according to the definition does not include a commercial establishment. Therefore, the same premises cannot be at at the same time a shop as well as a com-mercial establishment". Head note (*C*) reads as follows :

> "The word 'shop' is to be taken to mean a premises where trade or business is carried on in the shape of buying and selling of goods at the spot. It is rather axiomatic that in all trades it is the buying or selling which is going on in one form or the other *in praesenti* and in future or even on speculativs basis. But in a shop the buying and selling is at the premises or in other words on the spot for cash consideration or may be barter, or on credit. The significant factor is the availability of the goods, there and then and so also of services. The crux of the definition of the word shop in section 2 (*cxxv*) is that the business or trade *vis-a-vis* the shop is the actual buying and selling of goods and that must take a place in the premises".

The Full Bench was concerned with the definition of Shop and Commercial Establish-ments Acts. The said decision is not appli-cable to the facts of this case.

7. The next case cited by the learned coun-sel *viz., Public Prosecutor* v. *Shanmugham Pillai*[1], is also a case where a Bench of this Court was concerned with the meaning of the term 'shop' to be given under the Madras Shops and Establishments Act.

8. The other decisions cited by the learned counsel are only for purpose of supporting the proposition of law that words which are not defined in a statute and which are in every day use must be construed in their popular sense meaning that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. No exception can be taken to the proposition of law advanced by the learned counsel.

9. The learned counsel then drew my atten-tion to a circular dated 25th August, 1977 issued by the Dy. Administrative Officer

1. A.I.R. 1963 Punjab 148.

1. (1960) M. W. N. 265 : (1959) 2 L. L. J. 802.

(OB & M & DESK), Employees' State Insurance Corporation, New Delhi to all Regional Directors. In that circular certain guidelines have been given to decide the nature of the establishments which would be covered by the word shop. In that circular it is stated : "Shop may be understood to mean any premises where goods are sold either by retail or wholesale or where sale of services to customers takes place and includes any office, store room, godown, or warehouse whether in the same premises or elsewhere used in connection with such trade or business of sale of goods or services. The expression shop should not include : (1) Hotels, restaurants, departmental canteens/ stores exclusively meant for the benefit of the employees, clubs. (2) Educational institutions, hospitals and dispensaries, doctor's clinic including X-ray clinics and pathological laboratories, office of the auditors and solicitors-chartered accountants, firm of engineers and architects rendering technical advice. (3) Banks, stock and share exchanges, insurance companies, brokers dealing with shares, debentures etc., firms doing money lending business. (4) Chambers of Commerce and Industries". According to the learned counsel, the petitioner's concern is a financial institution and therefore the authorities did not intend that institutions like the petitioner would be covered by the word 'shop' in the Notification. As against this Miss Radha Srinivasan, the learned counsel for the respondents drew my attention to another circular No. P-11/21st April, 1979 Ins. Desk-I dated 3rd December, 1979 wherein the attention of the Regional Directors have been drawn to the fact of the Kerala High Court judgment in *Kerala State Financial Enterprises Ltd.* v. *E. S. I. Corporation*[1]. This circular has been issued in variation of the circular dated 25th August, 1977 which was very heavily relied upon by Mr. Devanathan to show that firms doing money lending business were not intended by the department to be covered by the Act. In the circumstances, I do not think that a reference to the circulars can be of any help in deciding the question.

10. Admittedly, the petitioner renders service to its customers by advancing monies to purchase motor vehicles on hire-purchase. The moneys are advanced on the security of the motor vehicles themselves. The learned counsel was not in a position to dispute the fact that rendering of such services form the main part of business activity of the petitioner. However, the learned counsel urged that the services that are rendered by an establishment shop to fall within the mischief of the word 'shop' must be personal services rendered in the premises of the establishment shop itself. The learned counsel was not in a position to convince me with any binding authority that such services should be personal services rendered on the spot. The learned counsel then advanced an argument that no services are rendered by the petitioner in its premises. The service of lending moneys on hire-purchase according to the counsel is done by its canvassing agents outside the premises. However, after a discussion on the *modus operandi* adopted by the petitioner in advancing loans on hire-purchase and after being confronted with the position that those canvassing agents had only authority to canvass business for the petitioner and had no power in themselves to advance moneys, the learned counsel did not pursue the argument further.

11. The question whether the Kerala State Financial Enterprises Limited, a public Sector undertaking, is a shop came up for consideration in M. F. A No. 434 of 1978 before the Kerala High Court. Kadar, J., speaking for the Bench observed as follows :

> "It has come out in the evidence of P. W. 1 that the applicant (Kerala State Financial Enterprises Limited) is conducting chitties and they are also advancing money to its customers to purchase articles on hire-purchase agreements. The evidence on record clearly establishes that the applicant is conducting business and is rendering service to its customers for remuneration and that this is a shop coming within the notification issued under section 1 (5) of the Act by the Government of Kerala".

12. I therefore do not find any grounds to re-consider the decision rendered by me in (*New India Martine Agencies (Private) Limited, Madras* v. *The Government of Tamil Nadu, represented by the Secretary, Department of Labour and Employment, Madras and another*[1]. On the facts of this case, I have no hesitation in holding that the petitioner's establishment falls within the meaning of the word 'shop' in the Notification.

13. In the result, the writ petition fails and is dismissed. There will be no order as to costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—*Ratnam, J.*

State of Tamil Nadu by Collector at Tiruchirapalli and another .... *Petitioners**

v.

C. T. Senthilnathan Chettiar .... *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) and Act (XVII of 1970)—Proceedings initiated under the earlier Act regarding declaration of surplus lands—Proceeding pending—Coming into force of the latter Act—Land Tribunal could proceed to determine surplus on the basis of the principal Act only.

Originally in computing the ceiling under the provisions of the Tamil Nadu Act LVIII of 1961 in relation to the lands held by the respondent and his wife, it was held that the respondent and his wife were entitled to hold and remain in possession of only 40 standard acres. Aggrieved by this adjudication, the respondent preferred an appeal to the Land Tribunal. The Land Tribunal set aside the order and remitted the matter for a consideration of the validity of certain alienations and also to ascertain whether the alienations would or would not be hit by section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act. Thereafter the Authorised Officer held that the alienations to the extent of 22.81 standard acres were valid and after making provision for stridhana holdings the excess was declared surplus. There was an appeal against that order in which it was contended that the provision of Act XVII of 1970 was applicable and not Act LVIII of 1961. Again there was an order by which the Authorised Officer was directed to find out whether Act XVII of 1970 will apply or not. The Authorised Officer held that the provisions of Act LVIII of 1961 only will apply and directed the landholder to specify the land for the purpose of surrender as being in excess of the ceiling area. There was an appeal to the Land Tribunal which took the view that only Act XVII of 1970 was applicable and no question of surplus would arise. On revision to the High Court.

Held, that it was obvious from a reference to the facts that even before Tamil Nadu Act XVII of 1970 had come into force and even at the time when the Act came into force, proceedings initiated already under Act LVIII of 1961 were pending consequently, the Land Tribunal in the instant case could proceed to determine the surplus only on the basis of the principal Act LVIII of 1961 without reference to Tamil Nadu Act XVII of 1970. Section 3 (1) and (2) of the provisions of Tamil Nadu Act XVII of 1970 makes it absolutely clear that the object of the Act is for reducing the ceiling area to 15 standard acres but the reduced ceiling is to be given effect to from 15th February, 1970 and therefore the provision is made that even when the ceiling of any person is decided

1. W. P. No 4077 of 1977.

*C. R. P. No. 2706 of 1977. *15th April, 1980.*

with reference to the provisions of the principal Act LVIII of 1961 under section 3 (1) of the Act XVII of 1970, still, because of the effect of section 3 (2) of the latter Act, such person can hold land after 15th February, 1970 only subject to the reduced ceiling limit prescribed by Act XVII of 1970.

[*Para.* 2.]

The order of the Land Tribunal was set aside and that of the Authorised Officer restored.

Cases referred to :—

Minor Jayachandran v. *The Authorised Officer,* (1975) 2 M. L. J. (N. R. C.) 17; *T. M. Abdul Gani* v. *The State of Tamil Nadu,* (1975) 1 M. L. J. 67.

Petition under section 83 of Act LVIII of 1961 read with section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Land Tribunal (Principal Subordinate Judge and Vacation Judge) Thiruchirapalli dated 2nd June, 1977 and made in LT. CMA/. No. 3 of 1977 (MRI 14P 166 KLI 58-61, dated 14th December, 1976, Authorised Officer (Land Reforms), Tiruchirapalli.

The Additional Government Pleader, for Petitioners.

K. N. Balasubramanian and T. Dhanya Kumar, for Respondent.

The Court made the following

ORDER.—In this civil revision petition at the instance of the State of Tamil Nadu represented by the Collector of Tiruchirapalli and another, the only question that arises for decision is whether the provisions of the Tamil Nadu Act LVIII of 1961 or the Tamil Nadu Act XVII of 1970 will be applicable to the respondent The facts lie within a short compass and there has been no dispute by either party about the same. Originally, in computing the ceiling under the provisions of the Tamil Nadu Act LVIII of 1961 in relation to the lands held by the respondent and his wife, it was held that the respondent and his wife were in possession of 51.325 standard acres, while they were entitled to hold and remain in possession of only 40 standard acres. Aggrieved by this adjudication, the respondent preferred LT. CMA No. 148 of 1968 to the Land Tribunal (Principal Subordinate Judge), Tiruchirapalli. The Land Tribunal set aside the order and remitted the matter for a consideration of the validity of certain alienations and also to ascertain whether the alienations would or would not be hit by section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act.

Thereafter, by his order dated 27th June, 1973, the Authorised Officer held that the alienations to the extent of 22.281 standard acres are valid and making provision for Stridhana holdings in an extent of 10 standard acres for the wife of the respondent the excess lands were declared in an extent of 19.044 standard acres (51.325 minus 22.281 plus 10 standard acres). That order was again the subject-matter of another appeal in LT. CMA. No. 62 of 1974 wherein the respondent contended that the originally permitted holding of 40 standard acres could not be disturbed and reduced to 32.281 standard acres and that the provisions of Tamil Nadu Act XVII of 1970 would be applicable and not those of Tamil Nadu Act LVIII of 1961. Again on 5th January, 1976, there was a remit order by which the Authorised Officer was directed to find out whether Act XVII of 1970 will apply or not, especially in view of the decisions of this Court in *Minor Jayachandran by guardian and mother Deivanai Ammal v. The Authorised Officer Land Reforms Tiruchirapalli*[1]. The Authorised Officer (Land Reforms) Tiruchirapalli, thereafter held that the decision referred to above did not apply to the facts of the present case as proceedings in the instant case had already been taken under the principal Act LVIII of 1961 and consequently, section 3 (1) of Act XVII of 1970 which provided for the continuance of proceedings already taken would apply and not the provisions of Act XVII of 1970 as claimed by the respondent. In the result, the Authorised Officer directed the respondent to specify 19.044 standard acres for purposes of surrender as being in

1. (1975) 2 M. L. J. (S. N.) 17.

excess of the ceiling area. Aggrieved by this order, the respondent herein preferred an appeal in LT. CMA. No. 3 of 1977 before the Land Tribunal (Principal Subordinate Judge) Tiruchirapalli. The Land Tribunal took the view that the notice issued by the Authorised Officer marked as Exhibit A-1 indicated that action had been taken against the respondent only under Act XVII of 1970 and therefore, having initiated proceedings under Act XVII of 1970 on 5th October, 1974, it was not open to the Authorised Officer to go back on it and to initiate proceedings under Act LVIII of 1961. Consequently the Land Tribunal held that in view of the applicability of the provisions of Act XVII of 1970, no question of surplus would arise and therefore, directed the dropping of further proceedings.

2. While the learned counsel for the petitioner contends that the proceedings in the present case must be governed by the provisions of Act LVIII of 1961, the learned counsel for the respondent contends that having regard to the issue of a notice by the second petitioner to the respondent on 15th October, 1974 under Act XVII of 1970, it is no longer open to the petitioner to go back on it and apply the provisions of Act LVIII of 1961. According to the provisions of Act LVIII of 1961 the ceiling area in the case of every person and in the case of every family consisting of not more than five members is 10 standard acres. Even after the implementation of the provisions of that Act, it was found that there was considerable disparity in ownership of agricultural lands leading to a concentration of such lands in the hands of certain persons and it was therefore thought to reduce such disperity by resorting to further agrarian reforms and with a view to achieve that the ceiling was reduced from 30 standard acres to 15 standard acres and this was effected by Tamil Nadu Act XVII of 1970 which came into force on 15th February, 1970 and the notified date under that Act was 2nd October, 1970. It is necessary in order to appreciate the contentions raised to refer to section 3 of Tamil Nadu Act XVII of 1970 which is really in the nature of a saving provision. That section reads thus:

"*Saving*:— (1) Subject to the provisions of sub-section (2) any action taken (including any order made, notification issued, decision or direction given, proceeding taken, liability or penalty incurred and punishment awarded) under the provisions of the Principal Act before the date of publication of this Act in the Fort St. George Gazette, may be continued or enforced after the said date in accordance with the provisions of the principal Act as if this Act had not been passed.

(2) Nothing in sub-section (2) shall be deemed to entitle any person whether or not such person is a party to any proceeding mentioned in sub-section (1), to hold after the 15th day of February, 1970, land in excess of the ceiling area under the Principal Act as modified by section 2 and the provisions of the Principal Act as modified by section 2 shall, after the said date, apply to such person."

The plain meaning of section 3 of the Tamil Nadu Act XVII of 1970 is that all sections and proceedings taken before the date of publication of Act XVIII of 1970 in the Gazette (which was on 23rd June, 1970) should be continued and proceeded with after 23rd June, 1970 in accordance with the provisions of Tamil Nadu Act LVIII of 1961, as if the provisions of Act XVII of 1970 had not been passed. The continuance of the proceedings thus permitted under section 3 (1), however was made subject to the further restriction indicated under sub-section (2) to the effect that such continuance should not enable a person to escape the consequences of the reduction of the ceiling affected by Act XVII of 1970 which permitted the holding of only 15 standard acres after 15th February, 1970. Therefore, while under Act LVIII of 1961, the ceiling limit was 30 standard acres, it was reduced under the Reduction of Ceiling on Land Act, 1970, Act XVII of 1970, to 15 standard acres and therefore, it is that section 3 (2) provided that though the proceedings taken under the provisions of the Act LVIII of 1961 before the date of publication of the Act in the Gazette *viz.* 23rd June, 1970 may be continu-

ed or enforced in accordance with the provisions of Act LVIII of 1961, yet, such continuance or enforcement would not permit the holding of an area in ex.ess of 15 standard acres after 15th February, 1970. That is why sub-section (2) of section 3 made it clear that on and after 15th February, 1970, the mere continuance of proceedings initiated prior to 23rd June, 1960 under the provisions of the Tamil Nadu Act LVIII of 1961 would not enable a person to hold after 1970 lands in excess of 15 standard acres. This Court had occasion in *T. M. Abdul Gani* v. *State of Tamil Nadu represented by the Collector of Thanjavur and others*[1] to examine the scope of section 3 (1) and (2) of Tamil Nadu Act XVII of 1970. It is pointed out by Ismail, J. as he then was that

> "Sub-section (1) of section 3 of the Tamil Nadu Act XVII of 1970, which I have extracted, clearly shows that any action taken prior to the coming into force of the Tamil Nadu Act XVII of 1970 will continue and will take effect under the provisions of the Principal Act, as if that Act had not been amended by the Tamil Nadu Act XVII of 1970. Consequently, in this case, since the Authorised Officer has passed orders under section 10 (5) of the Principal Act prior to the coming into force of the Tamil Nadu Act XVII of 1970, and at the time when that Act came into force, the appeal preferred by the petitioner to the Land Tribunal was pending, the Land Tribunal could determine the surplus only on the basis of the principal Act LVIII of 1961 without reference at the Tamil Nadu Act XVII of 1970 "

This decision had also been confirmed on appeal in W. A. No. 181 of 1974 by a Bench consisting of Veeraswamy, CJ., and Justice Natarajan on 10th July 1975. The question which has now to be decided is whether in the present case proceedings have been initiated under Act LVIII of 1961 already which could be continued or whether they were initiated only after the provisions of Tamil Nadu Act XVII of 1970 had come into force. It is obvious from a reference to the facts that even before Tamil Nadu Act XVII of 1970 had come into force and even at the time when that Act came into force, proceedings initiated already under Act LVIII of 1961 were pending and consequently, the Land Tribunal in the instant case could proceed to determine the surplus only on the basis of the principal Act LVIII of 1961 without reference to Tamil Nadu Act XVII of 1970. The reliance placed by the Land Tribunal on Exhibit A-1 does not indicate that the proceedings were initiated for the first time only under Act XVII of 1970. A reading of section 3 (1) and (2) of the provisions of of Tamil Nadu Act XVII of 1970 makes it absolutely clear that the object of that Act is to reduce the ceiling area to 15 standard acres but the reduced ceiling is to be given effect to from 15th February, 1970 and therefore, the provision is made that even when the ceiling of any person is decided with reference to the provisions of the Principal Act LVIII of 1961 under section 3 (1) of the Act XVII of 1970, still because of the effect of section 3 (2) of the latter Act, such person can hold land after 15th February, 1970 only subject to the reduced ceiling limit prescribed by Act XVII of 1970. A careful perusal of Exhibit A-1 would indicate that it is only for the purpose of fixing the reduced ceiling that the notice had been issued and not as if no prior proceedings whatever under Act LVIII of 1961 had been taken at all. The reliance, therefore, upon this notice by the Land Tribunal to hold that proceedings had been initiated as against the respondent only pursuant to the provisions of Act XVII of 1970 cannot therefore be supported. The Land Tribunal, therefore, ought to have applied section 3 (1) of the Tamil Nadu Act XVII of 1970 to the instant case. The order of the Land Tribunal is, therefore, set aside and that of the Authorised Officer restored. The civil revision petition is allowed. There will, however, be no order as to costs.

R. S. —— *Petition allowed.*

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1. (1975) 1 M.L.J. 67.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*M M Ismail, CJ. and M. A. Satha Sayeed, J.*

The Tamil Nadu Electricity Board represented by its Secretary, Madras ... *Appellant**

v.

Tamil Nadu Electricity Board Accounts and Executive Staff Union by its General Secretary ... *Respondent.*

Constitution of India (1950), Article 226 — Employees Union — Grant of recognition by employer — Recognition granted in respect of ministerial staff excluding peons, bill-collectors and store-keepers — Subsequently union enrolling members from peons, bill-collectors and store-keepers also — Union explaining that it represents and bargains only for ministerial staff excluding peons, bill-collectors and store-keepers — Explanation not accepted by employer — Order of derecognition — Order challenged by Union under Article 226 — Writ of certiorari *issued — Appeal by employer dismissed.*

The respondent was accorded recognition by the appellant and paragraph 3 of the order stated as follows :

> "The Tamil Nadu Electricity Board accepts the recommendation of the Commissioner of Labour, Madras and hereby accords recognition under the Code of Discipline in Industry to the Tamil Nadu Electricity Board Accounts Subordinates Union, Coimbatore (Reg No. ?422) in respect of the ministerial staff excluding peons, bill collectors and store-keepers".

Subsequently the Union started enrolling members from peons, bill-collectors and store-keepers also. In view of this, the appellant proposed to de-recognise the union as having violated the condition of the recognition. The union pointed out that though it had changed its name and changed its coverage in the sense of extension of membership, it had not changed its representative capacity and as a bargaining agent, was still continuing to represent and bargain only for the ministerial staff excluding peons, bill-collectors and store-keepers. Notwithstanding this explanation of the union, the appellant de-recognised the union. Against these proceedings the union filed a writ petition which was allowed and the appellant filed the present writ appeal.

The appellant contended that the recognition granted was not under any statute and that the Code of Discipline in Industry was itself not statutory.

Held : It was not in dispute that the grant of recognition conferred a status on a body like the respondent union to represent the workers in a particular category, with reference to their service conditions, with the management ; in other words, it becomes a bargaining agent on behalf of the group of workers with reference to which it was recognised. Withdrawal of that status of recognition would certainly bring about adverse consequences on a body like the respondent-union, and with reference to such adverse consequences, even in respect of an order of withdrawal like the one made by the appellant, if it was illegal or was in violation of the principles of natural justice, certainly a body like the respondent-union could approach the High Court under Article 226 of the Constitution of India. [*Para.* 7.]

In this case, from the correspondence that passed between the parties it was clear that the respondent-union did not claim any right to represent peons, bill-collectors and store-keepers, but continued to represent only the ministerial staff and though it claimed a right to extend the coverage in the sense of extension of membership, it stood by the earlier order of recognition confirming its representative capacity or bargaining power only in respect of the ministerial staff. If

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*W. A. No. 501 of 1980. *22nd September*, 1980.

so, there was no violation of the conditions of recognition. The withdrawal of recognition was made on an erroneous basis that there had been a violation of the conditions of recognition, since the respondent took up the stand that its capacity under the recognition as a body to represent only the ministerial staff remained unchanged.

[*Para.* 8.]

Cases referred to :—

A. C. Mukherjee v. *Union of India*, (1972) 2 Lab. L. J. 297; *M. A. David* v. *K. S. E. Board*, (1973) 2 Lab. L. J. 466.

Appeal under Clause 15 of the Letters Patent against the Order of Mr. Justice Mohan, dated 11th August, 1980 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 5742 of 1979 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records pertaining to the impugned order of the Tamil Nadu Electricity Board bearing B. P. Ms. No. 269, dated 24th November, 1979 and to quash the said Order.

M. R. Narayanaswamy, for *P. V. Marthandan*, *S. K Marthandan* and *S. Pandurangam*, for Appellant.

The Judgment of the Court was delivered by

Ismail CJ. :—This is an appeal against the order of Mohan, J., dated 11th August, 1980, allowing W. P. No. 5742 of 1979 filed by the respondent herein.

2. The respondent accorded recognition to the appellant by its proceedings No. 1238 dated 30th July, 1969. Paragraph 3 of this order states as follows :

"The Tamil Nadu Etectricity Board accepts the recommendation of the Commissioner of Labour, Madras, and hereby accords recognition under the Code of Discipline in Industry to the Tamil Nadu Electricity Board Accounts Subordinates Union, Coimbatore (Reg No. 2472) in respect of the ministerial staff excluding peons, bill-collectors and store-keepers

3. Subsequently, the Union, namely, the respondent herein, started enrolling members from peons, bill-collectors and store-keepers also. In view of this the appellant proposed to de-recognise union as having violated the condition of the recognition. The respondent-union pointed out that, though it had changed its name and changed its coverage in the sense of extension of membership, it had not changed its representative capacity and as a bargaining agent, was still continuing to represent and bargain only for the ministerial staff excluding peons, bill collectors and store-keepers. Notwithstanding this explanation of the respondent-union, the appellant, by its proceedings dated 24th November, 1979, de-recognised the union. It was against these proceedings the writ petition in question was filed praying for the issue of a writ of *certiorari*. The learned Judge having allowed the writ petition, the present writ appeal has been filed by the Board.

4. Two submissions were made by Mr. M. R. Narayanaswami, the learned counsel for the appellant. One was that the writ petition itself was not maintainable, because the recognition was not granted under any statute and, secondly, that the Code of Discipline in Industry referred to in paragraph 3 of the proceedings of the Board, dated 30th July, 1969, were themselves not statutory. In support of these contentions, the learned counsel relied on two decisions. One was of the Calcutta High Court in *A. C. Mukherjee and others* v. *Union of India and others*[1] and the other was of the Kerala High Court in *M. A. David* v. *K. S. E. Board.*[2] In the former decision, paragraph 15 of the judgment states :

"The other point raised on behalf of the appellants almost goes by admission. The Code of Discipline is not a statutory rule and violation of the said Code is not within the jurisdiction of Article 226 of the Constitution It has been conceded by Mr. Dutta appearing for the appellant".

1. (1972) 2 L L. J. 297.
2. (1973) 2 L. L. J. 446.

Thus the point was not decided in the judgment, as the learned Judges themselves state that the matter went by admission.

5. As far as the second decision is concerned, that was a case of de-recognition made without giving any notice. The contention that was raised there was that there had been a violation of the principles of natural justice, inasmuch as no notice was given before the recognition was withdrawn. In that case the Kerala High Court referred to the judgment of the Calcutta High Court to which we have already drawn attention, and pointed out that the facts in that case were almost similar to those in the case before them. Having said so, the learned Judges proceeded to observe:

> "It is not claimed that there is any statutory rule or at least an agreement between the Board and the union that the recognition once granted will not be withdrawn without giving an opportunity to the union to be heard. We hasten to add that, if there is only an agreement, then Article 226 may not be available, unless, probably, it can be construed that the said agreement is part of the conditions of service as contemplated by Article 309 of the Constitution. In a case like this, where there is no statutory rule or even an agreement, the union cannot insist that it should be heard before the recognition is withdrawn. It must be remembered that what the Board has done in this case was to lay down a policy as to how industrial peace could be achieved, which unions should be considered as representative of particular categories of employees and which unions should be allowed to resort to collective bargaining on behalf of the said workers. It must also be remembered that these arrangements made under Exhibit P-9 are only for three years. It is quite possible that, after three years, if circumstances change, and the representation of the workers in particular unions also change, the Board might change their decision and recognise some other unions, which are then found to be more representative of the categories of workers, and in that re-arrangement the appellant-union might also be recognised for the particular type of workers it represents.
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> "In the absence of any statutory rule or at least an agreement, the appellant-union cannot insist that it should be heard before the recognition is withdrawn. We, therefore, confirm the decision of the single Judge and dismiss the appeal. However, we do not pass any order regarding costs."

6. For more than one reason, we are unable to follow the above judgment. That was also a case of de-recognition of the Kerala State Electricity Board Executive Workers' Union by the Kerala State Electricity Board. With reference to such a union we are unable to see any justification for a reference to Article 309 of the Constitution of India at all. Secondly in that case, as the judgment itself points out, what the Board had decided was to lay down a policy as to how industrial peace could be achieved, which union should be considered as representative of particular categories of employees and which unions should be allowed to resort to collective bargaining on behalf of the said workers. That is not the position in the present case. Recognition was granted by the appellant to the respondent union on the latter's application expressly for recognition, and therefore the circumstances are not the same. Thirdly, in the case before the Kerala High Court, as the judgment itself points out, the arrangements made by the Kerala State Electricity Board under Exhibit P-9, were only for three years, while no such restriction is present in the case on hand. For all these reasons we are unable to hold that the decision of the Kerala High Court has any application to the present case. On the other hand, if it is to be held that, unless there is a statutory provision dealing with recognition, it is not possible for a person like the respondent to approach the Court under Article 226 of the Constitution, in the event of de-recognition, either on the ground of violation of the principles of natural justice or on the ground of respectfully disagree with the view of the Kerala High Court, for the reasons which we shall presently indicate.

7. Admittedly there is no statutory provision in this case dealing with the question of recognition or de-recognition. Equally

admittedly the Code of Discipline in Industry is not statutory. Notwithstanding this, it is conceded by the learned counsel for the appellant that the Code of Discipline in Industry does contemplate recognition and that it was only under that Code recognition was applied for and granted. It is not disputed that the grant of recognition confers a status on a body like the respondent-union to represent the workers in a particular category, with reference to their service conditions, with the Management; in other words, it becomes a bargaining agent on behalf of the group of workers with reference to which it was recognised. Withdrawal of that statues or recognition will certainly bring about adverse consequences, on a body like the respondent-union, and, with reference to such adverse consequences, even an order of withdrawal like the one made by the appellant if it is illegal or is in violation of principles of natural justice, certainly a body like the respondent-union can approach this Court under Article 226 of the Constitution of India. Therefore we reject the contention of the learned counsel for the appellant that the writ petition was not maintainable.

8. As far as the second point is concerned, as we already pointen out, recognition was withdrawn only on the ground that the condition of re-ecognition had been violated. We have already extracted paragraph 3 of the proceedings of the Board granting recognition, and that does not say anything about coverage in the sense of membership; it merely refers to the union being recognised in respect of the ministerial staff, excluding peons, bill-collectors and store-keepers. In this case, from the correspondence that passed between the parties it is clear that the respondent-union did not claim any right to represent peons, bill-collectors and store-keepers, but continued to represent only the ministerial staff and, though it claimed it might extend the coverage in the sense of membership, it stood by the earlier order of recognition confining its representative capacity or bargaining power only in respect of the ministerial staff. If so, there is no violation of the conditions of recognition. As a matter of fact, the impugned order of the Board does not even refer to the stand of the respondent-union, that, notwithstanding the enlargement of membership, it continued to have the status and capacity to represent only the ministerial staff.

9. Under these circumstances, we are of the opinion that the withdrawal of recognition was made on an erroneous basis that there had been a violation of the conditions of recognition, since the respondent took up the stand that its capacity under the recognition as body a to represent only the ministerial staff remained uncharged. Hence the writ appeal fails and is dismissed.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Wazirunnissa Begam ... *Petitioner**

v.

S. Mohamed Haneef .... *Respondents.*

Co-owner—Co-owner owning a fractional share in property filing suit for ejectment—Other co-sharers not added as parties to the suit—Defendant claiming to be purchaser of the rest of the property— uit whether maintainable.

Held: that in this case the remedy of the petitioner would have been, not in a suit for ejectment, but in a suit for partition as against the respondent. The fact that the respondent had not proved his claim of having purchased the rest of the shares in the suit land does not therefore lead to a different result. The weakness in the petitioner's suit was that as a co owner of only a quarter

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*C. R. P. No. 745 of 1979. 5th September, 1980.

share in the suit property she yet sought to evict the respondent from the property as a whole, without the other sharers being associated, along with her, in her action. This cannot be done. [*Para.* 10.]

Cases referred to :—

Sri Ram Pasricha v. *Jagannath*, (1977) R.C.J. 494 : (1976) 4 S. C. C. 184: (1977) 1 S.C.R. 395: A.I.R. 1976 S. C. 2335; *Vasudevan* v. *Ramachandran*, (1980) 1 M. L.J. 534.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of Small Causes (4th Judge), Madras, dated 14th September, 1978 and passed in Eject Suit No. 274 of 1975.

K. Kumaraswami, for Petitioner.

A. A. S. Mustafa, for Respondent.

The Court made the following

ORDER.—This civil revision petition has been brought before this Court by one Wazirunnissa Begum from a decree passed by the Court of Small Causes, Madras dismissing a suit in ejectment filed by her against one Mohammed Haneef The claim of the petitioner, Wazirunnissa Begum, in the suit was that she was the owner of an item of vacant land bearing door No. 7; Yahya Ali First Srteet, Vellala Teynampet, Madras and that she had let it out to the respondent on a monthly rent of Rs. 25. She had issued a notice on 10th May, 1975, terminating the tenancy with effect from 30th May, 1975. Following the refusal by the respondent to vacate the land, she had instituted the suit in ejectment.

2. The respondent resisted the suit on the score that the petitioner was not the full or exclusive owner of the suit land, but she held only a fractional share therein, the remaining shares being owned by the petitioner's relations. The respondent further claimed that barring the interest of the petitioner in the suit land, he himself had purchased the rest of the interest in the property from the other sharers. He accordingly contended that the petitioner was not entitled to file a suit in ejectment against him, all on her own, in the absence of the other co-sharers before the Court, and without adding them as parties to the suit.

3. The major question which figured at the trial of the suit was whether the petitioner by herself alone was entitled to maintain the suit in ejectment. At the trial, the petitioner relied on the lease agreement between her and the respondent and the counter-foils of rent receipts which she had issued to the respondent for receipt of rent, so as to prove that the respondent was a tenant under her and under no one else, and she was entitled to sue him on that basis.

4. On the side of the respondent, however, reliance was placed on a partition decree, a certified copy of which was marked in evidence at the trial. The partition suit had been filed long prior to the present suit in ejectment. The petitioner, Wazirunnissa Begum, was one of the parties to that suit, and the decree passed in that suit covered, among other items, the suit land bearing No. 7, Yahya Ali First Street, Vellala Teynampet, Madras. Under he terms of the partition decree, the petitioner was declared to be entitled only to an one-fourth share in the suit land, and the other shares were declared to belong to three other parties to the suit. Relying on this partition decree, the respondent sought to make good his plea that the suit filed by the petitioner seeking to eject him from the entire suit land did not lie. The trial Court accepted this plea as well-founded, and dismissed the suit on that score.

5. In this revision filed by Wazirunnisa Begum, her learned counsel, Mr. K. Kumaraswamy, urged that the trial Court had proceeded on a misconception about the legal position of a co-owner of property. He submitted that a co-owner is the absolute owner of the entirety of the property, and not

merely of a fractional share therein. He relied on a decision of the Supreme Court in *Sri Ram Pasricha* v. *Jagannath*[1]. He drew my attention to the following passage in the judgment of the Supreme Court:

> "We are of opinion that a co-owner is as much an owner of the entire property as any sole owner of a property is".

The following observations in the same judgment were also referred to as being to the same effect:

> "Jurisprudentially, it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property."

6. Mr. Mustafa, learned counsel for the respondent, however, urged that the decision of the Supreme Court would apply only to cases of joint or co-ownership of property, strictly so called, and it cannot be applied to the present case. Learned counsel pointed out, by way of distinction, that what we have in the present case is an item of property belonging to Mahomedan co-heirs. The position of co-heirs under the Mahomedan law, according to learned counsel, was not that of joint owners of the property devolving on them, but that of tenants-in-common. Learned counsel said that whereas co-owners have unity of title in the property jointly owned by them, there is no such unified title to be found in a tenancy-in-common. Every one of the tenants-in-common, he urged, has a separate and distinct title of his own with reference to his aliquot share in the property. Learned counsel accordingly submitted that the petitioner Waziruannissa Begum could not have designed either to induct the respondent into the suit land or to eject him from it as a whole, acting all on her own In any case, he urged, the suit was not maintainable when the other tenants-in-common did not figure either as co-plaintiffs or as defendants before the Court.

7. I think it may not be necessary to go into the marks of distinction which Mr. Mustaffa drew between Muslim co-heirs and other kinds of joint owners of property. For the decision in the present case can be rested, more easily, on the decree for partition covering the suit land. Under the terms of the decree, the Court had clearly defined and distinguished the share of the petitioner Waziruannissa Begum from those of the other sharers. In the face of this decree, the petitioner's rights as well as remedies over the suit land can hardly ever be in doubt. They are strictly limited to, and cannot transcend, her quarter share in the property. In the very judgment of the Supreme Court cited by the learned counsel for the petitioner in *Sri Ram Pasricha* v. *Jagannath*[1], while the Supreme Court observed that a co-owner owns every part of the composite property along with others and he cannot be mistaken to be only a part owner or fractional owner thereof, they took care to point out, at the same time, that:

> "The position will change......... when partition takes place."

8. The decree for partition in the present case must, therefore, put the lid on further discussion, and the petitioner must be held not entitled to sue for the respondent's ejectment when she was not the absolute or exclusive owner of the suit land, and when the other individuals entitled to the other defined shares in the land had not joined her in the action.

9. Mr. Kumaraswamy in the course of his arguments, referred to a recent decision of mine, reported in *Vasudevan* v. *Ramachandran*[2]. That case, however, was different. It arose under the relative provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The question in that case was whether a co-owner of a building can file a petition before the Rent Controller for evicting the tenant from the premises without the written authorization or consent of the other co-owners. For the tenant in that case it was urged that section 10 (8) applied to such an eviction petition. I

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1. (1977) R.G.J. 494: (1976) 4 S.C.C. 184: (1977) 1 S.C.R. 395: A. I. R. 1976 S.C. 2335.

1. (1976) 4 S. C. C. 184: (1977) 1 S. C. R. 395: A.I.R. 1976 S.C 2335.
2. (1980) 1 M. L. J. 534.

held that the provision quoted applied strictly only to an agent acting for the landlord, and that one co-owner could by no means be regarded as an agent of the other co-owners. I further held, relying on a special enlarged, definition of the term "landlord" occurring in the Rent Control Act, to hold that a co-owner was entitled to evict the tenant, acting on his own and without joining the other co-owners as joint petitioners. The decision clearly turned on the Rent Control Act, and it has no bearing on the question at issue in the present case.

10. Learned counsel for the petitioner then submitted that although the respondent had pleaded that he had purchased the rest of the shares in the suit land from the other sharers, he did not mark in evidence any sale deeds at the trial or furnish any other proof of the conveyance. I must point out at once that if such proof had been filed before the Court, the position would have quite changed for the petitioner herself. For, in that event, the remedy for the petitioner would have lain, not in a suit for ejectment, but in a suit for partition as against the respondent. The fact that the respondent had not proved his claim of having purchased the rest of the shares in the suit land does not therefore lead to a different result. As I had earlier pointed out, the weakness in the petitioner's suit was that as owner of only a quarter share in the suit property she yet sought to evict the respondent from the property as a whole without the other sharers being associated, along with her, in her action.

11. For all the reasons stated above, I agree with the decision of the Court below that the suit was not entertainable as framed. The civil revision petition is accordingly dismissed. In the peculiar cirumstances of the case, however, there will be no order as to costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Nainar Sundaram, J.*

Ahamed .... *Appellant**

v.

Rukmaniammal and others .... *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 100 — Joint endorsement by parties that dispute about title may be agitated and adjudicated in a regular suit — Petition dismissed in view of endorsement—Order not one against the plaintiff.

If there has been a reservation with regard to the right claimed and agitated and such right or claims are not given up by the party or rejected by the Court then the order that terminates such proceedings though worded as one of dismissal, would not amount to an order against the party. The procedure under rule 100 of Order 21 of the Code of Civil Procedure, is only optional and the applicant can always withdraw his application, making appropriate reservation to resort to remedy under the general law of filing a title suit. In the present suit, there was no investigation into or satisfaction reached by the Court that the plaintiff's claim was futile and was liable to be rejected. In the present case, the order of dismissal was the result of a joint endorsement. Both the parties consciously agreed to have the matter agitated and adjudicated in a regular suit. There was no abandonment of rights or claim and the joint endorsement clearly reveals the intention of the party to pursue further the rights claimed. [*Para.* 5.]

Case referred to :—

Cannanore Bank Ltd. v. *Madhavi*, (1941) 2 M. L. J. 956: I. L. R. (1942) Mad. 336: 54 L. W. 671: A. I. R. 1942 Mad. 41.

*S. A. No. 2282 of 1977. *19th December, 1980.*

Appeal against the decree dated 25th August 1977 of the Court of the Subordinate Judge. Tiruchirapalli, in Appeal Suit No. 101 of 1977, preferred against the decree of the Court of the District Munsif of Tiruchirapalli, in Original Suit No. 1484 of 1974.

K. Chandran and *S. Ravindran*, for Appellant.

S. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant in O. S. No. 1484 of 1974 on the file of the District Munsif of Tiruchirapalli is the appellant and the second respondent is the second defendant in that suit. It is unnecessary to refer to the facts which have given rise to the litigation in detail. The plaintiff wanted a declaration of her title and recovery of possession from the first defendant on the basis of a deed dated 19th July, 1954, the original of which has been marked as Exhibit B-1. That deed was executed by the plaintiff Thandavaraya Pillai. The very same Thandavaraya Pillai under Exhibit B-9, dated 24th September, 1966, conveyed the property to the first defendant. There was a proceeding for eviction instituted by the first defendant against Thandavaraya Pillai before the Rent Controller, Tiruchirapalli and pursuant to the order obtained therein possession has been obtained by the first defendant. However, the plaintiff took proceedings under Order 21, rules 100 and 101 of the Code of Civil Procedure. The said proceedings terminated on a joint endorsement. I will have occasion to refer to it subsequently while dealing with the second point mooted out for consideration.

2. The first Court dismissed the suit of the plaintiff. However on appeal the plaintiff succeeded. Hence the second appeal by the first defendant. Two questions have been formulated for consideration at the time of admission of this second appeal and they run as follows :

"1. On a true construction of Exhibit B-1, whether the plaintiff gets any title to the property ; and

2. Whether the suit is barred by limitation".

3. I have been taken through the recitals in Exhibit B-1. The very preface to the deed characterises it as settlement. There is no ambiguity that the ultimate beneficiary is the plaintiff. From a reading of the deed, it is not possible to spell out that the settlor Thandavaraya Pillai reserved any right for himself. Under the deed the settlor has completely divested himself of all his interest to and in favour of the beneficiary only. If this is so, the said Thandavaraya Pillai was not competent to execute Exhibit B-6 in favour of the first defendant. What was contended by the first defendant in the Courts below was that the recitals in the deed indicate that there was no intention on the part of the settlor to transfer any right *in praesenti*, but the intention was to transfer the rights only after the lifetime of Thandavaraya Pillai. No such construction is possible in view of the express recitals in the deed. Rightly the lower appellate Court held that the plaintiff has got title to the suit property on the basis of Exhibit E-1.

4. Coming to the second question as to whether the suit filed by the plaintiff is barred by limitation it will depend upon the construction of the order that came to be passed in the proceeding under Order 21, rules 100 and 101 of the Code of Civil Procedure. The certified copy of the concerned petition and the orders passed thereon have been marked as Exhibit A-2 in the case. There was a joint endorsement made by the parties on 4th March, 1968, which reads as follows :

"Since both parties to the dispute feel that there is a *bona fide* dispute about title they agree to have the matter agitated and adjudicated in a regular suit to be filed by the petitioner. Hence this application is not pressed and may be dismissed without costs".

On the basis of the said joint endorsement, the following order was passed on the same day *i. e.*, 4th March, 1968:

> "A joint endorsement is made and recorded. Petition is dismissed. No costs."

5. Mr. K. Chandramouli learned counsel for the appellant, would state that the said order passed would come within the mischief of the expressions "against whom an order is made" occurring in rule 103 of Order 21 of the Code of Civil Procedure, and the suit not having been filed within one year from the date of the said order is barred by limitation. The question is as to whether the order passed as per Exhibit A-2 on the joint endorsement would amount to an order against the plaintiff. The learned counsel would refer to the dictum of the Full Bench of this Court in *Cannanore Bank Ltd.* v. *Madhavi*[1], where the Full Bench dealt with a case arising under Order 21, rule 63 of the Code of Civil Procedure, in which the claim petition objecting to an attachment was simply "not pressed and dismissed" and a subsequent suit for declaration was filed. The Full Bench points out that where the claimant says to the Court that he does not press the petition and consents to an order of dismissal, it is an adverse order. At the same time, the Full Bench points out that if the person objecting to the attachment does not ask for his claim to be investigated and the order on the petition is merely that it be recorded, it cannot be said that this is an order "against" him. Again the Full Bench points out that if the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course, it might very well be that the order would not be adverse order within the meaning of the rule. Towards the end of the judgment, the Full Bench urther observes as follows:

> "If the petition is a petition which falls within rule 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights it is obviously an order which is against him".

If there has been a reservation with regard to the right claimed and agitated and such rights or claims are not given up by the party or rejected by the Court then the order that terminates such proceedings though worded as one of dismissal, would not amount to an order against the party. The observations of the Full Bench support this view of mine. The procedure under rule 100 of Order 21 of the Code of Civil Procedure, is only optional and the applicant can always withdraw his application, making appropriate reservation to resort to the remedy under the general law of filing a title suit. This is what has happened in the present suit. There was no investigation into or satisfaction reached by the Court that the claim was futile and was liable to be rejected. In the present case the order of dismissal is the result of a joint endorsement. Both the parties consciously agreed to have the matter agitated and adjudicated in a regular suit. There was no abandonment of rights or claims and the joint endorsement clearly reveals the intention of the party to pursue further the rights claimed. In the said circumstances, it is not possible to apply the final ratio of the Full Bench referred to above to the facts of the present case and hold that the order passed on 4th March, 1968, is an order against the plaintiff and hence she must file the suit under Order 21, rule 103 of the Code of Civil Procedure, within one year from the date of the order. Rightly this point has been found against the first defendant by the lower appellate Court.

6. For all the above reasons the second appeal fails and the same is dismissed. But there will be no order as to costs.

R. S. —— *Appeal dismissed.*

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1. (1941) 2 M.L.J. 956: I.L.R. (1942) Mad. 336; 54 L.W. 671: A.I.R. 1942 Mad. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam, J.*

K. M. Abdul Jabbar ... *Appellant**

v.

Indo Singapore Traders (P.) Ltd., represented by Managing Director, Mohammad Abdullah and another ... *Respondents.*

Civil Procedure Code (V of 1908), section 13 (b) — Decree obtained in High Court of Singapore — Leave to defend not given to defendant — Decision of Court not rendered on merits — Judgment not conclusive.

The uniform view of all the High Courts in India is that a decree passed by a Court under the summary procedure after refusing leave to defend sought by the defendant is not a judgment on merits. The decision of the Singapore High Court in the instant case cannot be taken to be a judgment on merits as contemplated by section 13 (*b*) of the Code of Civil Procedure, and, therefore, it cannot be taken to be conclusive. [*Para.* 7.]

Cases referred to:

Isidore Fernando v. *Thommai Antoni Michael Fernando*, (1933) 38 L. W. 232: A. I. R. 1933 Mad. 544; *O. P. Verma* v. *Lala Gehrilal*, A. I. R. 1962 Rajasthan 231; *Ramacarandas Radhavallabh* v. *Bhagwandas Dwarkadas*, (1965) 2 S C. J. 810: (1965) 2 S.C.R 186: A I R. 1965 S. C. 1144.

Appeal against the order of the District Court of East Thanjavur at Nagapattinam dated 27th December, 1976 and made in E. P. No. 9 of 1976 in S. No. 2598 of 1975 on the file of the Singapore High Court.

K. Ramamurthy, for Appellant.

V. Sridharan and *G. Masilamani*, for Respondents.

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*A. A. O. No. 58 of 1977.

3rd October, 1980

The Court made the following

Order.—The second defendant in suit No. 2598 of 1975 on the file of the High Court of Republic of Singapore against whom E. P. No. 9 of 1976 has been filed on the file of the District Court, East Thanjavur at Nagapattinam is the appellant herein.

2. The first respondent herein obtained a decree for a sum of 30,000 dollars against the appellant herein and the second respondent in Suit No 2598 of 1975 on the file of the High Court of Republic of Singapore on 20th October, 1975. The suit claim was based on an arrangement contained in a deed dated 3rd February, 1975. The first respondent-decree-holder filed E. P. No. 9 of 1976 on the file of the District Court, East Thanjavur at Nagapattinam, for recovery of Rs. 1,09,840 by attachment and sale of the immoveable properties mentioned in the list attached to the execution petition The second respondent herein, who was the first respondent in the execution petition before the Court below remained *ex parte*. The second defendant, who was the second respondent in the execution petition alone resisted the said execution petition on the following grounds:—

(1) that the decree is not one passed on merits;

(2) that the proceedings in which the judgment and decree were obtained were opposed to natural justice;

(3) that the certificate of non-satisfaction by the decree-holder is defective and inadequate;

(4) That there is no reciprocal arrangement under which Singapore decree can be executed in India;

(5) that the exchange value is not correctly stated; and

(6) that the decree sought to be executed is not one passed by the Judge of the High Court of Singapore, but one by the Deputy Registrar of that Court.

All the said grounds of objection have been considered by the Court below and have been overruled. After overruling all the

objections, the lower Court allowed the execution by attachment and sale of the immovable property to proceed. In this appeal the learned counsel for the appellant does not challenge the findings of the Court below with reference to all the objections except objection No. 1. Therefore, it is unnecessary to go into the correctness or otherwise of the findings rendered by the Court below with reference to the other grounds apart from ground No. 1.

3. As already stated in ground No. 1 the appellant has contended that the decree is not one passed on merits and, therefore, it cannot be taken to be conclusive under section 13 (*b*) of the Code of Civil Procedure, and, therefore, the decree is in executable by the lower Court. According to section 13 of the Code of Civil Procedure, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except among other things where it has not been given on the merits of the case. According to the learned counsel for the appellant as soon as summons were served in the suit, the first and second defendants, the appellant and the second respondent herein, appeared by counsel and affidavits were filed on behalf of both the defendants for leave to defend. But as the leave to defend sought for by the defendants was not given and the Court passed a decree straightway, it was contended by the appellant before the Court below that the decision rendered in the suit by the Singapore High Court was not on merits and, therefore, the judgment cannot be taken to be conclusive under section 13 (*b*) of the Code of Civil Procedure to sustain the execution petition filed by the decree-holder.

4. The first respondent, however, contended before the Court below that the judgment of the Singapore High Court was rendered after the respondents entered appearance through their counsel in pursuance of the summons and filed their affidavits as evidenced by Exhibits B-1 to B-5 and, therefore, the decision of the Singapore High Court should be taken to be a judgment on merits. The Court below has held that as the judgment of the Singapore High Court was not an *ex parte* judgment, but a judgment rendered after the defendants appeared before the Court through their counsel and putting their defence in the form of affidavits while seeking leave to defend, the judgment should be taken to be one on merits so as to be conclusive under section 13 (*b*) of the Code of Civil Procedure. The view taken by the Court below has been challenged in this appeal filed by the second defendant.

5. In *Isidore Fernando* v *Thommai Antoni Michael Fernando*[1], on almost similar facts this Court held that an *ex parte* decree under the summary procedure of the Court of Ceylon was not a judgment on merits within the meaning of section 13 (*b*) of the Code of Civil Procedure. In that case a suit was filed on a promissory note for a sum Rs. 1,300 in the District Court of Colombo under the summary procedure (Chapter 52, Ceylon Ordinance No. 2 of 1889) The defendant did not appear to obtain leave to defend, in time, and so an *ex parte* decree was passed. He then appeared and asked for the matter to be re-opened and for leave to defend the suit. The Court noted as follows:

> "Defence unsatisfactory.
>
> Leave to defend will be granted on defendant giving security in Rs. 1,390 on or before the 12th January, 1925."

As the security was not furnished by the defendant, a decree came to be passed for the amount claimed in the suit. Later, a suit was filed on the said foreign judgment before the Sub-Court, Tuticorin under section 13 of the Code of Civil Procedure, as the defendant was then living at Tuticorin. The suit was resisted *inter alia* on the ground that the foreign decree relied upon in the plaint is not a decree on the merits, and therefore, the suit is not maintainable. The lower appellate Court, however, took a different view. When the matter came to this Court, this Court

1. (1933) 38 L. W. 232: A.I.R. 1933 Mad. 544.

after dealing with the suits filed under the summary procedure expressed the view as ollows :

"Not a single decision has been quoted before me in which an *ex parte* decree obtained under the summary procedure has been held to be one on the merits, whereas an *ex parte* decree obtained on the regular procedure under section 704 of the Ordinance has been held by the decision of the Full Bench to be not one on the merits."

Ultimately the Court held that an *ex parte* decree obtained under the summary procedure of the Court of Ceylon is not one on merits and that it is not a judgment as is required under section 13 of the Code of Civil Procedure and that a suit based on such an *ex parte* decree does not satisfy the conditions of section 13 (*b*) of the Code. In this case a distinction was made between a judgment which was required to dispose of a case finally, according to the usual procedure and a decree to be passed in accordance with clauses (*a*), (*b*), (*c*) of sub-rule (2) of Order 37 and considerable significance was laid on the fact that sub-rule (2) does not speak of a judgment as defined under section 2 (9) of the Code of Civil Procedure.

6. This decision has been relied on and followed by a Division Bench of the Rajasthan High Court in *O. P. Verma* v. *Lala Gehrilal and another*[1]. In that case a decree had been obtained on the basis of a negotiable instrument under the summary procedure provided in Order 37 of the Code of Civil Procedure after the defendant appeared through his counsel and his prayer for leave to defend had been rejected from a Court in the State of Bikaner, which is a native State and, as such, it is a foreign Court for the purpose of section 13 of the Code. The question arose as to whether the said decree was one on merits and as such conclusive under section 13. After considering the question in an elaborate detail, if I may say so with respect, after referring to all the relevant decisions on the point, the Division Bench observed as follows:—

"From a review of the case-law made above, we are clearly of opinion that in order that a judgment of a foreign court may successfully pass the test of having been given on the merits, such a judgment must not have been given either as a matter of penalty or as a matter of mere form based on special or summary procedure inasmuch as such a trial does not offer any real or substantial opportunity to the defendant to contest the suit as a matter of right as he receives it under a regular procedure. This is, however, not to say that an *ex parte* judgment *per se* may not be a judgment on the merits. It may very well be. It is not the presence of the absence of the defendant which can really condition the quality of a judgment as to its having been given on the merits or not. What really matters is whether the procedure according to which the suit has been decreed requires the Court to determine the truth or falsity of the contentions raised or which may be raised. It seems to us that where it is so required unless the Court applies its mind to the contentions raised on either side, there cannot but be a judgment on merits. Where the procedure, however, does not so require and a decree can be entered in favour of plaintiff merely because the defendant has failed to appear and the judgment is given in default, or where he has failed to apply for leave to defend, or where he has applied for leave to defend and such leave is refused, then we are disposed to hold the view that such a judgment cannot be held to have been given on the merits within the meaning of section 13 (*b*), Civil Procedure Code".

According to the learned Judges, a decree passed in a suit brought under the provisions of Order 37, Civil Procedure Code, without going into the merits of the defence either because the defendant failed to appear or because he was not given leave to defend, cannot be held to be a judgment on the merits of the case. Referring to the Madras case cited above, the learned Judges

1. A. I. R. 1962 Raj. 231,

observed that the facts of the Madras case were somewhat parallel to the case before them and that the Madras judgment gives due significance to the special provisions dealing with the summary procedure under Order 37.

7. The learned counsel for the respondents, however, relied on a decision of the Supreme Court in *Ramkarandas Radhavallabh* v. *Bhagwandas Dwarkadas*[1] in support of his submission that since the Court has to consider the claim of the defendant for leave to defend even in a suit instituted under the summary procedure laid down in Order 37 and the Court has got a discretion to grant or not to grant leave to defend having regard to the defence taken, the decree passed by the Court after rejecting the defendants' application for leave to defend should be taken to be a judgment on merits. However, it is not possible for me to take that decision as one laying down that a decree passed under the summary procedure laid down in Order 37 after rejecting the application for leave to defend should be taken to be a judgment on merits. Apart from the fact that the case before the Supreme Court did not relate to the actual question that has arisen for consideration here the said judgment cannot also be taken to throw any light on that question. Almost all the High Courts have taken a uniform view that a decree passed by a Court under the summary procedure after refusing leave to defend sought for by the defendant is not a judgment on merits. As a matter of fact, no decision of any court has been cited before me by the learned counsel for the 1st respondent taking a contrary view. Having regard to the preponderance of judicial opinion, with which I respectfully agree, I hold that the decision of the Singapore High Court in Suit No. 2598 of 1975 cannot be taken to be a judgment on merits as contemplated by section 13 (*b*) of the Code of Civil Procedure and, therefore, it cannot be taken to be conclusive.

1. (1965) 2 S.C.J. 810: (1965) 2 S.C.R. 186: A.I.R. 1965 S.C. 1144.

8. In the result, the appellant succeeds and the appeal is allowed and the judgment of the Singapore High Court in the said suit so far it relates to the appellant cannot be executed in India. As the second respondent herein, who was the first defendant in the suit and the first respondent in the execution petition has not challenged the lower court's order passed in execution, that order so far as he is concerned has become final and therefore, the order passed by the executing Court as against him will have to stand. There will, however, be no order as to costs. The first respondent is at liberty to proceed with the execution as against the second respondent.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

P. S. Mohana Srinivasan ... *Appellant**

Girija ... *Respondent.*

Hindu Marriage Act (XXV of 1955), sections 12 (1) (b) and 28—Petition for annulment of marriage by husband alleging wife's pre-nuptial pregnency by some other person—Decreed by trial Court but reversed by lower appellate Court—Miscellaneous Second Appeal to High Court — Competency Erroneous finding by lower Appellate Court—Onus held to be discharged by petitioner.

Held:—In the light of the authorities the Civil Miscellaneous Second Appeal is maintainable. It can only be on a substantial question of law and the relief if any, that

*A.A.A. O. No. 38 of 1978. 13th March, 1980

can be granted in the appeal should not transcend the limits provided under section 100, Civil Procedure Code. [*Para.* 13.

Where relief of nullity of marriage is sought under section 12 (1) (*b*) of the Hindu Marriage Act the onus is on the petitioners to prove about pre-nuptial pregnancy of the wife. He has to establish about the birth of the child and that it was subsequent to the marriage and that he had no access before the marriage. The ouns must be held to be properly discharged in the instant case having regard to the testimony of the nurse who had spoken about it and filed the registers maintained by the Corporation, and non-access prior to the marriage of the husband not being disputed.

When legal and acceptable evidence required to establish a fact for which the onus is on the petitioner has been placed by him, if in spite of it, the lower appellate Court held that he had not discharged the onus cast upon him according to law, such finding being erroneous and against law, in the instant Civil Miscellaneous Second Appeal, the order of the court below has to be set aside resulting in the appellant securing the relief as prayed for by him.

[*Para.* 47.]

Cases referred to:—

Gurbachan Kaur v. *Sardar Swaran Singh*, (1978) All. W. C. 371: A. I. R. 1978 All. 255; *D. S. Seshadri* v. *Jayalakshmi*, (1963) 1 M. L. J. 11: I. L. R. (1963) Mad. 384: 76 L. W. 13: A. I. R. 1963 Mad. 283; *Bai Imiyabehn* v. *Ambalal Laxmidas* A. I. R. 1966 Gujarat 139; *Dhulappa Shivarai Molke* v. *Krishnabai*, A. I. R. 1962 Mys. 172; *Valliammal Ammal* v. *Periasami Udayar*, (1959) 2 M L. J 152: I. L. R. (1959) Mad. 969: 72 L. W. 453: A. I. R. 1959 Mad. 510; *Subbarama Reddiar* v. *Saraswathi Ammal*, (1966) 2 M. L. J 263: I. L. R. (1968) 1 Mad. 205: 79 L. W. 382: A. I. R. 1967 Mad. 85; *A. B. Manual* v. *Mrs. Lilian Margaret Manual* (1969) 2 M L J 539: A. I. R 1970 Mad. 178; *Rajendra Singh Yadav* v. *Chandrasen*, (1979) 2 S. C. J. 234: (1979) 4 S. C. C. 111: (1979) 1 S. C. W. R. 138: A. I. R. 1979 S. C. 882; *H.T. Vira Reddi* v. *Kistamma*, (1969) 1 M L.J. 366: 81 L. W. 490: A. I. R. 1969 Mad. 235; *Lachman Utamchand Kirpalani* v. *Meena*, (1964) 4 S. C. R. 331 : A. I. R. 1964 S C. 40; *Yaduray Bansi* v. *Suderbai*, A I R. 1969 Guj. 21; *E. J. White* v. *Mrs. K. O. White*, 1958 S.C.J. 839: 1958 S. C. R. 1410: (1958) 2 An. W. R. (S. C.) 125: (1958) 2 M.L.J (S.C.) 125: (1958) M. L. J. (Crl.) 631: A. I. R. 1958 S. C. 441; *Bipin Chander aisingh Bhai Shah* v. *Prabhawati*, 1957 S. C. J 144: (1957) S. C C 48: 1956 S C. R. 838: A. I. R 1957 S. C. 176; *P. S. Sivaguru* v. *P. S. Saroja*, (1960) 73 L.W. 224: A I. R. 1960 Mad. 216; *V Varadarajulu Naidu* v. *Babv Ammal*, (1964) 2 M L.J. 187: 77 L. W. 367: I. L R. (1964) 2 Mad. 574: A. I R 1965 Mad. 29; *S.* v. *R.*, A. I. R. 1968 Delhi 79; *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*, (1965) 1 S C. J. 788: (1964) 7 S. C. R 267: A. I R. 1965 S C. 364; *Nishit Kumar* v. *Anjali*, A I. R. 1968 Cal. 105; *Preston Jones* v. *Preston-Jones*, (1951) A. C. 391; *Baldev Raj* v. *Urmila Kumari*, (1979) S.C.C. (Crl.) 875: (1979) 3 S.C.C. 782: A. I. R. 1979 S. C. 879.

Appeal against the order of the Second Additional Judge. City Civil Court, Madras dated 25th March, 1978 and made in C M. A.No. 120 of 1977 (O. P. No. 478 of 1973-City Civil Court (6th Assistant Judge) Madras.

Vedantham Srinivasan, for Appellant.

R. S. Venkatachari, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was the petitioner in O. P. No. 478 of 1973 filed before VI Assistant City Civil Judge, Madras. It was a petition filed by him under section 12 (1) (*d*) of the Hindu Marriage Act for annulment of the marriage by a decree of nullity on the ground that his wife was already pregnant by some one other than the petitioner even before the marriage.

2. In the petition he claimed that the marriage with Girija, the respondent herein took place on 8th February, 1973 at Ambur

and before the marriage, his relations had gone to see her in her father's house and she was a having a slightly prominent abdomen, but his relations were told that her constitution was such and that nothing was wrong with her. He had not known her before marriage and had no occasion to meet her. Betrothal took place on 18th December, 1972 and after marriage, he was living with her in a separate house at Madras for just a month and within three months of marriage on 12th May, 1973, she complained of pain and immediately appellant brought a nurse working in the Corporation to attend on her and a child was born on that date at about 7.20 A. M. Shocked by the birth of the baby, he immediately informed her sister, and later during the course of the day, the respondent along with the child was handed over to her sister at Madras. Hence, he has filed the present petition.

3. In the counter statement, the allegations made above have been refuted and it is claimed that at no point of time, any objection was taken regarding the prominence of the abdomen and that she was leading a happy married life for a short while at Madras, and thereafter the husband and his relations teased her for some reason or other and ultimately jewels worth thirty sovereigns were snatched away and she was forced to leave for her place She did not give birth to any child on 12th May, 1973, as she was not pregrnant by somebody else and the petition is filed only to harass her.

4. The trial Court, on a consideration of the oral evidence as spoken to by the appellant as P. W. 1 and of the evidence tendered by the nurse as P. W. 2 and of the testimony of P. Ws 3 and 4, who are his close relations and of the sole evidence tendered by the elder sister of the respondent and of Exhibits A-1 to A-7 marked by the appellant, came to the conclusion that the respondent was pregnant even at the time of marriage by some person other than the appellant, and hence the marriage is a nullity within the meaning of section 12 (1) (*d*) of Act XXV of 1955. On appeal, the lower appellate Court in C. M. A. No. 120 of 1977 disagreed with the findings of the trial Court and held

> "The petitioner has failed to discharge the onus of proof upon him and under such circumstances, he will not be entitled to the relief claimed by him".

5. In this Civil Miscellaneous Second appeal filed by the husband, it is claimed that the lower appellate court had not properly considered about the discharge of burden of proof and failed to note that when respondent had pleaded about abortion only at the time of evidence and not earlier, it necessarily results in an admission on her part that she had become pregnant, and about the claim of abortion there being no plea raised in the proceedings at any earlier stage, and no evidence let in by her, the lower appellate court had misguided itself by holding that the appellant had not discharged the onus of proof, which admittedly rests upon him.

6. Yet another contention taken is, there being no plea raised at any stage of the proceedings, except when P. W. No. 1 was examined in court, about abortion, the lower appellate court erred in law, in considering the oral and documentary evidence 1st in by the appellant by taking into account a factor, which in law, cannot be considered, add thereby it had thoroughly misguided itself in allowing the appeal. Since the reasons given by lower appellate court for rejecting the official documents maintained by the Corporation of Madras are flimsy and are based on surmises, the appellant is entitled to the relief as prayed for, when he had discharged his burden by adducing cogent and relevant oral and documentary evidence.

7. Mr. R. S. Venkatachari, learned counsel for the respondent takes the preliminary objection regarding the maintainability of the appeal on the ground that there can be no second appeal to this Court in view of what is provided under section 28 of Act XXV of 1955 and even if it be maintainable, since the restraints found in section 100,

Civil Procedure Code would be applicable to this appeal, it will not be open to the appellant to canvass on questions of fact, and further he contends that even if there can be consideration of the evidence on record to find out whether the onus had been properly discharged or not, when there are apparent contradictions in the evidence of P. Ws. No 3 and 4 and when no reliance can be placed on Exhibit A-5, A-6 and A-7, there is no cause to interfere with the findings of the lower appellate court particularly in a matrimonial matter in which the future of a girl is involved.

8. On the preliminary objection taken regarding maintainability of the Civil Miscellaneous second appeal, in dealing with the scope of section 28 of the Act, in *Gurbachan Kaur* v. *Sardar Swaran Singh*[1], it has been held that the words 'decrees and orders' contained in section 28 of the Hindu Marri ge Act, according to their plain and natural sense, include not only original decrees and orders, but also appellate decrees and orders.

9. A division Bench of this Court in *D S. Seshadri* v. *Jayalakshmi*[2] has taken the view that section 28 of the Hindu Marriage Act, 1955, confers a right of appeal against all decrees and orders passed by the Court in any proceedings under the Act, and it is not necessary that such decrees or orders should satisfy the definition of the term 'decree' under Civil Procedure Code, and the right of appeal should co-exist along with any other law of procedure for the time being in force, and therefore when an order is made under section 12 of the Act, it will be subject to a ight of appeal under section 28 of the Act.

10. In *Bai Imiyabehn* v. *Ambalal Laxmidas*[3] an identical view had been taken by holding that the right of appeal conferred by the section and the jurisdiction and powers of the Court in dealing with the appeal are governed by the provisions of the Civil Procedure Code, and therefore a right of second appeal is conferred under section 28, but it is limited to the grounds set out in section .00, Civil Procedure Code and can be exercised only on questions of law and not on questions of fact.

1. (1 78) All. W. C. 371 : A. I R. 1978 All. 255'
2. (1963) 1 M L. J. 11 : I. L. R. (1963) Mad. 384: 76 L. W. 13 : A. I. R. 1963 Mad. 283.
3. A. I. R. 1966 Guj. 139.

11. Similar is the view taken in *Dhulappa Shivaraj Molke* v. *Krishnabai*[1] to the effect that the decisions made under the Act, shall be appealable in like manner as the decrees of the Court in civil suits, and they shall be appealable in like manner as orders in suits or other original proceedings. Not only an appeal can be preferred under section 28 of Act XX of 1955 read with section 96, Civil Procedure Code, but it will also extend to the right of presenting a further appeal against the decree passed on appeal under section 28 of the Act read with section 100, Civil Procedure Code on any of the grounds mentioned in the latter.

12. Yet another decision placed is the one reported in *Valliammal Ammal* v *Periasami Udayar*[2] wherein it was held that the decision rendered under section 12 of the Act should be deemed to be a decree and an appeal would lie to the District Court and in turn a second appeal would lie to the High Court.

13 In the light of what has been held above in these decisions this appeal is maintainable, and the preliminary objection taken by the learned counsel for the respondent therefore fails.

14. The next point taken by him is that in dealing with an appeal of this nature, the court has no jurisdiction to re-assess the evidence and come to a different conclusion though it may think that evidence ought to be appreciated differently or that some part of the testimony ought not to be believed and for this proposition, he relies upon the decision of a Division Bench of this Court in *Subbarama Reddiar* v. *Saraswathi Ammal*[3] There can be no dispute over this aspect because, even while dealing with the maintainability of this appeal, in the decisions

1. A. I. R. 1962 Mys. 172
2. (1959) 2 M.L.J. 157: I. L. R. (1959) Mad. 969: 72 L. W. 53 : A.I.R. 1959 Mad. 510.
3. (1966) 2 M. L. J 263 : I. L R. (1968) 1 Mad. 205: 79 L. W. 382 : A.I.R. 1967 Mad. 85,

above referred to, it has been clearly held that an appeal preferred under section 28 of the Act, has to be necessarily read with section 100, Civil Procedure Code, wherein only on a substantial question of law, an appeal can be entertained. Therefore, relief, if any, that can be granted in this appeal, should not transgress the limits provided under section 100 Civil Procedure Code.

15. The substantial question of law that was framed at the time of admission of this appeal is to the following effect :

> " Whether the conclusion of the appellate Court is justified on the evidence on record".

16. Both the counsel said that this cannot be a substantial question of law and therefore there is need for considering whether any substantial question of law arises for consideration or not.

17. Mr. Vedantham Srinivasan, learned counsel for the appellant pleaded that the substantial question of law involved in this Civil Miscellaneous second appeal is :

> "Whether onus is properly discharged, according to law and whether the lower appellate Court had properly understood of what should be the nature of evidence that is required under law to be adduced for discharging the onus which rests on the petitioner, in a petition filed under section 12 (1) (*a*) of Act XXV of 1955"?

18. To find out whether the lower appellate Court had properly understood what is considered as 'onus to be discharged by the appellant' which aspect is the substantial question of law that had arisen for consideration in this civil miscellaneous second appeal, initially it will be necessary to look into what has been taken into account by the lower appellate Court and how exactly it has approached this essential point, while disposing of the civil miscellaneous appeal. It came to the conclusion :

> "I am only inclined to say that the petitioner has failed to discharge the onus of proof upon him and under such circumstances, he will not be entitled to the relief claimed by him."

19. This conclusion makes it quite clear that the appeal was allowed on the ground, that the appellant herein has failed to discharge the onus of proof which rests upon him under law.

20. It will be useful even at this stage to extract another passage in the judgment of the Court below which is to the following effect :

> "If it is established clearly that on 12th May, 1973, the respondent delivered a child there can be absolutely no hesitation in coming to the conclusion that she was pregnant by some other person at the time of marriage. It is not the case of the respondent that the petitioner had access to her prior to the marriage".

The above extracted portion makes it clear that the lower appellate Court had properly approached the matter in seeking to find out whether the appellant was able to establish about the birth of a child on 12th May, 1973, or not. It came to the conclusion that the appellant was not able to establish about the birth of the child on the following grounds and the first of which is that the appellant did not mention the sex of the child in the petition and also in his deposition. P. W. 2, the Nurse attached to the Corporation of Madras, had stated that she attended on the respondent and a female child was born at 7. 20 A. M. on 12th May, 1973, that she remained there till 8. 30 A. M. and that she issued Exhibit A. 6, a certificate which is required for making entries in Birth and Death Registers. She has marked Exhibit A-5, the Register, where entries are made regarding the visits made, and there is an entry in the calls Register that on 12th May, 1973, a female child was born prematurely. According to her, it must be seven months old. Exhibit A. 7 is a Register of calls, maintained by her wherein also the necessary entries had been made by her about the birth of the female child. Lower appellate Court

held that P. W. 's. 3 and 4, who are close relations of the appellant, are highly interested and their evidence has to be scrutinised with great caution. But so far as the evidence tendered by P. W. 2 is concerned, she is an independent witness. She has spoken about entries made in the registers maintained in public offices. The ground on which the entries had been disbelieved is on a surmise that they have been manipulated because the elder brother of the appellant is working as a store-keeper in the Corporation of Madras. The appellant himself is only a cooly, and it is not correct to expect such a person to go round for the purpose of tampering with the records maintained in public office, wherein the entry relating to the birth of a child on 12th May, 1973, is one of hundreds of entries made in the register regarding the calls made by the Nurses of the Corporation for birth of children and for other purposes. Without giving any reasons, the lower appellate court had rejected the documentary evidence produced by the appellant on a flimsy ground, that they have been manipulated.

21. It was observed that there is no seal in Exhibits A-6 forgetting that there is no requirement in law that it should bear a seal because it is a certificate issued by a visiting Nurse about birth of a child to enable entries to be made immediately in the Registers of Birth and Deaths. P W. 2, the Nurse has stated that the word 'premature' had been written in 'red Ink' and a comment had been made that there are manipulations and alterations. But the Register contains similar entries in respect of births of several children and the use of red ink or an underlining, in respect of such odd cases, is a required procedure to be carried out. Thus, it will be seen that the lower appellate Court had initially stumbled upon a very irrelevant aspect of the failure of the appellant to mention about the sex of the child and that only P. W. 2, the Nurse, was able to speak about it and therefore it cannot be said that the claim made by him about the birth of a child cannot be believed.

22. I am not at this stage expressing any opinion as to the credibility of the evidence, being fully aware that it is not for this Court to re-assess the evidence. But I have touched upon the manner in which the lower appellate Court had dealt with the evidence to find out ultimately as to whether the lower appellate Court had properly understood as to what is the onus that rests upon a petitioner and what can be the acceptable and relevant evidence necessary for discharging such onus and whether in this case inspite of acceptable evidence being produced, the lower appellate Court was not in error in rejecting them by holding that the onus has not been discharged.

23. Proceeding further to consider the assessment of evidence made by the lower apellate Court for the purpose just now stated, the respondent had pleaded that there was only abortion and no delivery took place. Undoubtedly this factor had prevailed upon the mind of the Court, even though there had been no pleading on this aspect. It is not disputed that such a claim was never made either at the time when the reply notice was sent for the first time by the respondent under Exhibit A-4 through her counsel or even in the objection statement filed later or in the counter statement filed in the main O. P. itself. When no such plea is taken, as to whether evidence on that aspect can be let in, and even so, whether any finding can be rested on it, Mr. R S. Venkatachari, contends that in matrimonial matters what is paramount is to consider the consequential effect on the matrimonial happiness of the parties and merely because the respondent is absent or no proper evidence is let in, no Court shall immediately conclude that the claim made by the petitioner is established, and that there is a duty cast on the Court to satisfy itself whether the evidence tendered by the petitioner by itself would establish what is claimed in the petition filed under Act XXV of 1955. To sustain this contention he refers to the Full Bench decision of this Court in *A. B. Manual* v. *Mrs. Lilian Margaret Manual*[1] wherein it was held that the mere fact that the respondent did not

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1 (1969) 2 M. L. J 539 : A. I. R. 1970 Mad. 178.

care to contest the proceedings and remained *ex parte*, is no justification for the Court to treat the proceedings as purely formal and to act upon the evidence of the plaintiff or petitioner, uncorroborated as though it were evidence given by the plaintiff in a civil proceeding in which the defendant had remained *ex parte*, and that in matrimonial matters when the status of the individuals is involved and which in turn involves the interests of the Society, the Court shall not dispose of the matter in a formal sense, but must satisfy itself about the veracity and the adequacy of the evidence adduced.

24. Mr. Vedantham Srinivasan, refers to the decision rendered in *Rajendra Singh Yadav* v. *Chandra Sen*[1], in order to contend that what is not pleaded, cannot be allowed to be subject-matter of evidence. That was a case which arose under Act XLIII of 1951, Representation of the People Act-and he contended that the solitary evidence of R. W. 1 and the suggestion mad to the appellant about abortion for the first time in his cross examination cannot be treated as evidence at all, and that the lower appellate Court had taken into consideration such an irrelevant and unentertainable factor to come to the conclusion that the onus of the appellant had not been properly discharged. As to the burden of proof in matters of this nature, several decisions have been placed before me and I will be referring to them later on, and there can be no dispute that the entire burden rests only on the petitioner-appellant herein.

25. In a case where oral and documentary evidence is produced realising the onus which rests upon the appellant-petitioner and when the respondent fails to take up the truthful stand in the reply notice or in the counter statement, and for the first time she comes forward with a different version of what had happened on the crucial date, undoubtedly, what is pleaded by her has to be established only by her by adducing oral and documentary evidence. It would not be proper to make a suggestion during cross-examination of what had happened and fail to adduce any evidence whatsoever, in support of such a claim. A false evidence taken would act against the interests of the respondent and it is to this fact, a division Bench of this Court in *H. T. Vira Reddi* v. *Kistammal*[1], held that as a general rule, the burden of proof has to be discharged by the applicant, but at the same time putting forward a false defence will destroy the respondent's credibility.

26. Thus it is clear that when the respondent had come forward with the version of abortion having taken place on 12th May, 1973, and there being no acceptable evidence let in on this aspect, the lower appellate Court had committed an error in law in approaching the entire matter with such a possibility, and trying to find out whether the appellant was able to discharge such a possibility.

27. The lower appellate Court then took into account the discrepant and inconsistent deposition rendered by P. Ws. 3 and 4 who are admittedly close relations of the appellant. In an inquiry of this nature, a person can only look to either close friends or near relatives. The appellant is only a cooly and he is not a person who has extra resources in a situation of this nature to get at the services of doctors and others to attend on the birth of a child within 3 months of the marriage and therefore necessarily he had to go in for his relations to come and attend on his wife. They had spoken about what had happened on that day in the morning and also on the respondent being taken in a taxi to the house of her sister in Madras where she was left along with the child. It is entirely within the jurisdiction of a lower appellate Court to believe or disbelieve a witness and this Court is not for finding out whether there are discrepancies and inconsistencies as made out. Even eschewing from considering the evidence of P. Ws. 3 and 4, it will have to be seen whether appellant had discharged the onus which rests upon him, on the evidence

1. (1979) 2 S. C. J. 234 : (1979) 4 S. C. C. 111 : (1979) 1 S. C. W.R. 138 : A. I. R. 1979 S. C. 882

1. (1969) 1 M. L. J. 366 : 81 L. W. 490 : A. I. R. 1969 Mad. 235.

tendered by him as P. W. 1 and by the Nurse P. W. 2 and by the Exhibits A-1 to A-7 marked by him, of which three are public documents.

28. The other aspect is of the stand taken by the respondent in the earlier stages of the proceedings. On 14th May, 1973, itself, within two days of the birth of the child, the appellant wrote to the Corporation of Madras that his name should not be entered in the Register. He sent a lawyer's notice under Exhibit A-3 on that day itself adverting to the birth of a baby and that the pregnancy of respondent was suppressed at the time of the marriage. This was replied on 31st May, 1973, by the counsel for the respondent under Exhibit A-4 wherein it was stated that she was illtreated and her valuable jewels had been taken away and it was not correct to say that a child was born to her and she is entitled to claim damages of Rs 10,000 for mental agony caused to her. To what extent, she had the where-withal to have so much of jewels, is itself questionable, when it is stated that she did not have even resources to travel to Madras to give deposition in this case. She lives at Ambur about 120 miles away and her sister is working at Madras as a teacher and her father had come and attended the proceedings. In such a situation to claim that nothing happened on 12th May, 1973, and it was only because the appellant was bent upon marrying another person, she had been driven out, are only timeserving statements and they cannot be treated as evidence to hold that the appellant had not discharged the burden cast upon him.

29. The next aspect considered, was that if the child was seven months old at the time of marriage she must have been at least pregnant by four months and when the appellant has admitted that he has had intercourses with her it would not have been impossible for him to know that she was pregnant even on the date of marriage and that the women-folk in the house would have definitely known about it in or about 8th February, 1973. These are all surmises and the Court should not proceed on presumption to find out whether the appellant is a person who could have realised as to what was happening, himself having been unaware of what is the course of pregnancy. It is not in evidence that he had been married already or that she had at any earlier point of time informed him that she was pregnant. It has been observed that she could have been taken for medical examination to know about her pregnancy. But this could have been possible, if only she had informed him of what was developing. Therefore the lower appellate Court had made a negative approach to the point involved in this case and even though it had begun by properly comprehending what requires to be considered which I have extracted above, it had failed to properly understand by what nature of evidence the 'onus' of the petitioner can be discharged, but merely stated that the onus is on the petitioner and thereafter rejected every one of the acceptable evidence produced by him and the rejecting of the petition would not mean that the lower appellate Court had already assessed the evidence which precludes this Court to interfere with the findings arrived at by the lower appellate Court. Undoubtedly this Court would not reappreciate or reassess the evidence, but if it is made out that acceptable evidence or required evidence under law is available to Court, but rejected as not proper, then it necessarily results in an error of law being committed even though the lower appellate Court had known that the onus is only on the petitioner.

30. In a petition of this nature, on whom the burden of proof lies has been dealt with in several decisions and Mr. R. S. Venkatachari to begin with would refer to the decision in *Lachman Utamchand Kirpalani* v. *Meena alias Mota*[1], wherein it was held that in case of desertion pleaded the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him or her without reasonable cause.

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1. (1964) 4 S.C.R. 331: A.I.R. 1964 S.C. 40.

31. In *Yaduray Bansi* v. *Suderbai*[1], it was held that for proving cruelty while no direct evidence to support a party may be had there must be some reliable circumstances which tend to support the testimony of the petitioner.

32. In *H. T. Vira Reddi* v. *Kistamma*[2], a Division Bench of this Court held that depending upon the particular facts of each case and also depending upon the nature of the competing rival theories it will not be improper for the Court to take into consideration the fact that the case of one party had been proved to be completely false and at the same time it has to be borne in mind that. that, by itself would not amount to holding that the applicant has discharged the burden .... Undoubtedly matrimonial proceeding is an ordinary civil proceeding. But as it involves the disruption of marital tie, law imposes a stricter degree of scrutiny of the evidence if uncorroborated. Such corroboration is demanded as a rule of precaution and prudence so that a well-instructed mind may be able after bringing to bear its own observation and experience of life, to judge from the pros and cons of each particular case, whether the sole *ipsi dixit* renders possible the theory set out.

33. In *E. J. White* v. *Mrs. K. O. White*[3], dealing with the scope of the words "satisfied on the evidence" found in the Divorce Act (1869) it was held that it is for the petitioner to prove the claim made and that the guilt must be proved beyond reasonable doubt and its on that principle that the Courts in India approach matrimonial matters, because grave consequences follow on findings rendered in such proceedings.

34. Yet another decision he refers to is the one reported in *Bipin Chander Jaisingh Bhai Shah* v. *Prabhawati*[1], wherein it was held that desertion is a matter of inference to be drawn from the facts and circumstances of each case and the burden is on the plaintiff to prove that the deserting spouse has been in desertion throughout the statutory period of four years.

35. In *P. S. Sivaguru* v. *V. P. S. Saroja*[2], the learned Judge held that it is for the petitioner to show that he was ignorant of the facts upon the concealed pregnancy at the time of marriage and proceedings should be instituted within the period of limitation and it is only for the husband to satisfy the Court that he is entitled to a decree of nullity of marriage and there is no onus of proof on the respondent at all.

36. In *V. Varadarajulu Naidu* v. *Baby Ammal*[3], it was held that there is no rule of law precluding the Court from acting upon such uncorroborated evidence and the true test is to find out whether the Court is satisfied from the surrounding circumstances of what has been pleaded.

37. A Division Bench of the Delhi High Court in *S.* v. *R.*[4], held that the doctrine of want of sincerity and the doctrine of approbate and reprobate are not applicable in respect of proceedings instituted in this Court under Act XXV of 1955 and it is for the husband to discharge the burden as the petitioner of what has been pleaded by him and that findings of fact arrived at by the Courts below will not be interfered with in an appeal of this nature.

38. I have adverted to these decisions to restate the approach that has been made already by this Court that it is entirely for the appellant to establish about the birth of the child within three months of marriage

1. A. I. R. 1969 Guj. 21.
2. (1969) 1 M. L. J. 366 : 81 L. W. 490 : A. I. R. 1969 Mad. 235.
3. 1958 S. C. J. 839: 1958 S. C. R. 1410: (1958) 2 An. W.R. (S. C.) 125 : (1958) 2 M.L.J. (S.C.) 125: (1958) M.L.J. (Crl.) 631: A.I.R. 1958 S.C. 441.

1. 1956 S. C. R. 838 : 1957 S. C. J. 144 : 1957 S.C.C. 48: A.I.R. 1957 S.C. 176.
2. (1960) 73 L.W. 224: A.I.R. 1960 Mad. 216.
3. (1964) I.L R. 2 Mad. 274: (1964) 2 M.L.J. 18 : A.I.R. 1965 Mad. 29: 77 L.W. 367.
4. A. I. R. 1968 Delhi 79.

As pointed out by the lower appellate Court it is not the case of the respondent that the petitioner had any access to her prior to marriage. The lower appellate Court had also held that if the birth of the child within three months of marriage is proved, undoubtedly the appellant will be entitled to the relief as prayed for.

39. I have already held that the factors which had been taken into account by the lower appellate Court to hold that the appellant had not discharged the burden, are quite beside the point which should not prevail upon its mind in the light of what has been held in the decisions above referred to. When the onus is on the petitioner to prove about pre-marital pregnancy he is to establish about the birth of the child and that it was subsequent to marriage and that he had no access before marriage. In cases where long after marriage during a period when the husband has no access if a child is conceived he has to prove that during the period of gestation he never had access and lived with the wife. In dealing with a similar situation in *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*[1], it was held that no doubt that burden is on the husband and the period of gestation can be taken as 282 days and it is for the Court to find out from the medical opinion of the duration of pregnancy.

40. The other case dealing with pre-nuptial pregnancy of wife relied on is the one reported in *Nishit Kumar* v. *Anjali*[2], wherein it was held that no doubt the burden is entirely on the husband but the standard of proof is a light one and it should be taken to be discharged where there is admission of the parties and should be taken to be greatly shaken when the period of gestation differs adically and diverges largely from the normal period, of course being a matter in which strict proof has to be required and that a Court can derive its satisfaction only on matters on record.

1. (1964) 7 S.C.R. 267: (1965) 1 S.C.J. 788: A.I.R. 1965 S.C. 364.
2. A. I. R. 1968 Cal. 105.

41. Mr. Vedantham Srinivasan, on the aspect of period of gestation refers to the decision in *Preston Jones* v. *Preston Jones*[1], wherein it was held that when the husband was able to establish his absence between 360 and 186 days before birth and the child born was a normal and full grown child, the Court can take judicial notice of these facts even in the absence of expert medical opinion that the child must have been conceived outside wedlock.

42. As for the nature of medical opinion that may be required, in *Baldev Raj* v. *Urmila Kumari*[2], it was held that the testimony of the doctor could not be rejected on the ground that she had not specialised in gynaecology.

43. Therefore to find out whether the appellant had discharged the onus, according to law, himself having been confronted with a situation during the early hours of the morning of 12th May, 1973, he had rushed for aid of his relations initially and had also immediately secured the Nurse employed by the Corporation of Madras for attending to child births, who had spoken about the birth of a female child and of her making the consequential entries in the public records. To infer that the records have been manipulated because appellant's brother is working as a Store-keeper in the Corporation of Madras would not be a proper way of disbelieving offical documents and it is entirely for the respondent to establish that the documents are not genuine or that the entries are false. A public document kept in the normal course is proof of the entries found therein and it will be legal evidence to establish a certain fact unless the contrary is made out. P. W. 1 had spoken about the embarrassing situation which he had faced on that day. The lower appellate Court had refused to take into account the evidence of P. Ws. 3 and 4 as interested because they are close relations. In a matrimonial matter, relationship cannot be a ground to reject their evidence. But since the lower

1. (1951) A. C. 391.
2. (1979) S. C. C. (Crl.) 875 : (1979) 3 S. C. C 782 : A. I. R. 1979 S. C. 879.

appellate Court states that there are discrepancies in their evidence, as already held, they can be eschewed from consideration. To prove the birth, of the child there being the evidence of the Corporation Nurse who had spoken about it and who had filed the registers maintained by the Corporation, Exhibit A-6 certificate and corroborated by the evidence of the petitioner-appellant himself which had not been effectively assailed in the cross-examination it has to be held that he had properly discharged the burden cast on him according to law

44. It is in this context it will be necessary to look into what had been done by the respondent. Mr. R. S. Venkatachari contended that she can as well remain *ex parte* and she need not produce any evidence whatsoever and it is entirely for the appellant to prove the case. Even then, she comes forward with a new version for the first time when P. W. 1 was examined in the witness-box that she had abortion on 12th May, 1973 Therefore it necessarily results in an admission on her part that she had become pregnant by that date. She has avoided the witness-box. The excuse given by her sister who is the only witness who has been examined, is that the respondent does not have the means to go over to Madras and give evidence in this case. She further admitted that the respondent was employed on that date on a temporary job earning a sum of Rs. 80 per month and that she was not able to get leave to come to Court. It was also admitted by her that respondent's father had attended the Court and on one occasion her mother had also come to Court and that she was herself employed as a secondary grade teacher at Madras and her husband is employed at Stanley Medical College, as a cashier.

45. Quite rightly the counsel for the appellant contends that the respondent had avoided being examined in Court and the plea that she does not have resources even to travel a distance of 120 miles is patent falsehood when her father and mother could come to Madras for the hearings. Respondent's sister had also admitted that on the day in question, respondent came to her house along with the appellant and P. W. 3 and it would be 6 O'Clock in the evening. If really it was a case of abortion for which the respondent had been handed over to her sister R. W. 1 on that date, as her husband is working in Stanley Hospital, it would not have been difficult for the respondent to be admitted in that hospital wherein necessary entries would be found as to what had happened. P. W. 3 had stated that when they took respondent by Taxi, R. W. 1 and respondent and another sister got into the same taxi and went away and this probabilises that she might have got admitted into some hospital. Nothing could have prevented the respondent from establishing that what happened on 12th May, 1973, was only an abortion and nothing more. When the factum of pregnancy is admitted at the stage of hearing, to a large extent, the case of the appellant that respondent had become pregnant being established the only other aspect is to find out whether the premature child of seven moths was born on that date or it was only an abortion. The onus which rests upon the petitioner, according to law, being to place before Court indisputable oral and documentary evidence and of the probabilities of the case and when such materials had been placed by the appellant, the findings of the lower appellate Court that he had not established that a child was born on that date, based on irrelevant conjectures being necessarily erroneous, results in an error of law and has to be set aside.

46. The appellant is a cooly, who cannot afford the type of medical evidence that may be called for, when such things happen among the affluent families. He can get only a Nurse employed by the Corporation of Madras to attend on child births and she had marked the registers maintained in the usual course and there being nothing to disbelieve the entries found therein he had adduced necessary medical evidence which is required about the birth of a baby. Even apart from the medical opinion, the birth of a child as such can be established. But in a case of this nature, it will be necessary to find out whether it was a full grown child or

premature one. She had stated that if a child of six months is born, it will be dead and in this ca e, it was born alive and that it could have been seven months old As made out in *Preston Jones* v. *Preston Jones*[1] (already referred to) it is the period of gestation that can be taken into account and in this case, the very fact that within three months of marriage, a premature baby seven months old was born, shows necessarily respondent must have become pregnant earlier to marriage. Whether the appellant had access before the marriage is an aspect on which there is no doubt expressed by the Courts below because, even the lower appellate Court had begun by stating that it was not the case of the respondent that the appellant had access to her prior to marriage.

47. When legal and acceptable evidence required to establish a fact for which the onus is on the petitioner and such materials having been placed by him if in spite of it, the lower appellate Court is to hold that he had not discharged the onus cast upon him according to law, such a finding being erroneous and against law, in this civil miscellaneous second appeal, the order of the Court below has to be set aside resulting in the appellant securing the relief as prayed for by him O. P. No. 478 of 1973. The civil miscellaneous second appeal is allowed. No costs.

R. S. —— *Appeal allowed.*

1. 1951 A. C. 391.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail and V. Ratnam, JJ.*

K. **Jainulaluddeen and others** ... *Appellants**

v.

K. P. Jainulaluddeen and others ... *Respondents.*

Wakf Act (XXIX of 1954), section 3 (h) — *"Person interested in a wakf" — Definition and scope.*

The appellants applied under section 14 of the Wakf Act before the State Wakf Board for conducting an enquiry into the administration and management of a wakf. The respondents raised the plea that the appellants were not "persons interested in the wakf" as defined in the Act and cannot invoke the Board's jurisdiction under section 44 of the Act. The Board rejected the objection. A single Judge of the High Court, in writ proceedings upheld the objection and restrained the Wakf Board from conducting an enquiry into the affairs of the wakf. On appeal against the order,

Held : The former part of the definition of the word "person interested in a wakf" appearing in section 3 (*h*) of the Wakf Act, 1954, apart from stating that a person interested in a wakf means any person who is certified to receive any pecuniary benefits, also states that it means any person who is entitled to other benefits from the wakf. The expression "person who is entitled to receive other benefits from the wakf" is of the widest connotation, and there is neither reason nor principle to restrict the scope of that expression only to certain types of benefits analogous to pecuniary benefits. Whenever a benefit is reserved for the public in general without restricting the persons who will be entitled to participate therein

*W. A. Nos. 56 and 57 of 1976. 13th March, 1979.

either with reference to the age, or with reference to the social status, any person who will fall within the particular category of the persons for whom the benefit is reserved will be a person entitled to receive that benefit as of right and such a person will certainly be entitled to invoke the jurisdiction of a body like the wakf Board under section 44. It may be that a person may not be entitled to call upon the trustees to perform the particular charity in which under the trust deed he has a right to participate. If a narrow interpretation is to be given to the expression "any person interested in a wakf occurring in section 3 (h), section 44 will become inapplicable to a large number of public wakfs. From the very nature of the case, a public wakf will not indicate or enumerate the beneficiaries but will merely refer to the beneficiaries in general terms. The action under section 44 is meant for the better administration and management of the wakf as such, and the expression "a person interested in a wakf" will have to be understood in that context. If so understood any person who will be entitled to derive a benefit from the wakf will be a "person interested in the wakf" being clothed with a right to invoke the jurisdiction of the Board under section 44. Having regard to the objects and the terms of the present wakf, the appellants were "persons interested in the wakf" and therefore they were entitled to invoke the jurisdiction of the Wakf Board under section 44 of the Act. [*Para.* 4.]

Cases referred to:—

Ramachandra Iyer v. *Parameswaran Unni*, (1919) 36 M. L. J 396 : I. L. R. 42 Mad. 360; *Md. Khan Sait* v. *Kadir Batcha*, (1926) 23 L. W. 240 : A. I. R. 1926 Mad. 466; *Vydianathan Ayyar* v. *Swaminatha Iyer*, (1924) I. L. R. 47 Mad. 884 : 20 L. W. 803 : 47 M. L. J. 361 : 51 I. A. 282 : A. I. R. 1924 P. C. 221 (2); *Harhar Singh* v. *Gurudiam Singh* (1967) 2 S. C. R. 739 : A. I. R. 1967 S. C. 1415.

Appeals under clause 15 of the Letters Patent against the order dated 25th September, 1975 of Ramanujam, J., made in the exercise of the Special Original Jurisdiction of the High Court in W. P. Nos. 2938 and 4423 of 1975.

S. Gopalaratnam, for Appellants.

Khaja Mohideen, for Respondents.

S. M. Hameed Mohideen, for Wakf Board.

The Judgment of the Court was delivered by

Ismail, J.—These two writ appeals are directed against the common judgment of Ramanujam, J., dated 25th September, 1975, in W. P. Nos. 2938 and 4423 of 1975. The matter relates to a Wakf in Aravakurichi. The appellants herein filed an application before the State Wakf Board under section 14 of the Wakf Act, 1954 (Central Act XXIX of 1954) hereinafter (referred to as the Act) for conducting an enquiry into the administration and management of the Wakf. The respondents herein were the Trustees in management of the Wakf. The respondents herein took up an objection that the appellants herein were not "persons interested" as defined in the Act and that therefore they were not entitled to invoke the jurisdiction of the Wakf Board under section 44 since the section enables only a "person interested in a wakf" to make an application to the Board. The Board, by its order, dated 8th March, 1975, overruled this preliminary objection raised by the respondents herein and held that the appellants herein were persons interested in the wakf. It was at that stage the respondents herein came to this Court with the two writ petitions W. P. No. 2938 of 1975 for the issue of a writ of *certiorari* to quash the order of the Board dated 8th March, 1975 and W. P. No 4423 of 1975 for the issue of a writ of prohibition restraining the Wakf Board from conducting an enquiry into the affairs of the wakf in question. Ramanujam, J, by his impugned order allowed both the writ petitions. The learned Judge held that the appellants herein cannot be said to be "persons interested" in the Wakf and therefore they were not entitled to invoke the jurisdiction of the Board by filing an application before it

under section 44 of the Act. It is against this order of Ramanujam, J. the present appeals have been preferred.

2. These appeals require consideration of the definition of the term "persons interested in a Wakf" occurring in section 3 (*h*) of the Act. From the very nature of the case, such an expression has to be considered only with reference to terms of the particular Wakf, because, that expression cannot be construed in vacuum but has to be understood only in the context of the objects of the particular Wakf. The expression "persons interested in a Wakf" has been defined as follows in section 3 (*h*) :-

> "3(*h*) "Person interested in a Wakf" means any person who is entitled to receive any pecuniary or other benefits from the Wakf and includes.
>
> (*i*) any person who has a right to worship, or to perform any religious rite in a mosque, idgah, imambara, dargah, Khankah, maqbara, graveyard or any other religious institution under the Wakf;
>
> (*ii*) The wakif and any descendant of the wakif and the mutawalli:-

With reference to this definition, the question for consideration is whether the appellants can be said to be interested in the Wakf in question.

3. The Wakf in question has been created by a document dated 5th September, 1908, Several charities are prescribed to be performed in the trust deed. One such thing is the running of a Madarasa for the purpose of imparting religious instructions to the Muslim children. The document does not impose any restriction whatever on the status of the Muslim children who can receive the education in the institution. In fact, the document refers to every Muslim boy and girl who seeks to receive religious instruction in the Madarasa being entitled to receive the education. In addition to that, paragraph 6 of the document refers to four further charities. One was the performance of funeral rites of the Muslims who die; the second was the performance of marriage of poor Muslim girls; the third was helping Muslims to perform their Haj Pilgrimage, and the fourth was feeding the MUSAFIRS who come in the month of Ramzan. Even here, only with regard to the marriage, the same in confined to poor Muslim girls; but in respect of performance of the funeral rites and helping Muslims to perform their Haj Pilgrimage, no restriction whatever is imposed on the age, status or the economic condition of the Muslims who will be eligible to receive the benefit thereunder. The entire document makes it absolutely clear that the author of the wakf was greatly interested in making the wakf permanently useful to the Muslim general public, and this is made abundantly clear by the provisions therein that any Muslim of the village in question can approach a Court at the expense of the trust itself in the event of the trustees not performing their obligations. The document further provides that if the prominent Muslims of the Aravakurichi village bring to the notice of the heirs of the wakif in charge of the management of the trust that the income of the trust can be utilised for the various charities in a proportion different from the one prescribed by the wakf or can be utilised for a particular charity not mentioned in the document, they must consider the suggestions and if the majority of them think that the suggestions were good, they must carry out the charities accordingly. All these features in the trust deed make it absolutely clear that the wakif intended the trust to be as broad-based and as public as he can possibly make the same with reference to the objects which he sought to achieve. The questtion for consideration is whether in such a context the appellants herein can be said to be persons interested in the wakf or not.

4. It has to be seen that the former part of the definition, apart from stating that a person interested in a wakf means any person who is entitled to receive any pecuniary benefits, also states that it means any person who is entitled to other benefits from the wakf. The expression "person who is entitled to receive other benefits from the

wakf" is of the widest connetation, and there is neither reason nor principle to restrict the scope of that expression only to certain types of benefits analogous to pecuniary benefits. Ramanujam, J., would appear to have taken the view that only persons who have been given pecuniary or other benefits under the wakf" deed which they could claim as of right, would come within the scope of the expression "persons interested in a wakf". We are of the opinion that whenever a benefit is reserved for the public in general without restricting the persons who will be entitled to participate therein either with reference to the religious, or with reference to the age, or with reference to the social status any person who will fall within the particular category of the persons for whom the benefit is reserved will be a person entitled to receive that benefit as of right and such a person will certainly be entitled to invoke the jurisdiction of a body like the Wakf Board under section 44. It may be that a person may not be entitled to call upon the trustees to confer a particular benefit personally on him. But certainly it will be open to him to call upon the trustees to perform the particular charity in which under the trust deed he has a right to participate. If a narrow interpretation is to be given to the expression "any person interested in a wakf" occurring in section 3 (*h*), section 44 will become inapplicable to a large number of public wakfs, because, from the very nature of the case, a public wakf will not indicate or enumerate the beneficiaries but will merely refer to the beneficiaries is general terms. Section 44 of the Act states:

> "Any person interested in a wakf may make an application to the Board supported by an affidavit to institute an enquiry relating to the administration of the wakf and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such action thereon as it thinks fit."

Thus it will be seen that the action under section 44 is meant for the better administration and management of the wakf as such, and the expression " a person interested in a wakf" will have to be understood in that context. If so understood, any person who will be entitled to derive a benefit from the wakf will be a 'person interested in the wakf', being clothed with a right to invoke the jurisdiction of the Board under section 44. Therefore, having regard to the objects and the terms of the present wakf, we are clearly of the opinion that the appellants are 'persons interested in the wakf' and therefore they are entitled to invoke the jurisdiction of the Wakf Board under section 44 of the Act.

5. Ramanujam, J., has been influenced by the decisions bearing on the scope of the expression "persons interested in the trust" occurring in section 92 of the Code of Civil Procedure. However, with respect to the learned Judge, we are of the opinion that these decisions have no relevance to this case, because, in this case we have a definition for "person interested in the wakf" in section 3 (*h*), while there is no such definition with reference to the expression "persons interested in the trust" occurring in section 92 of the Code of Civil Procedure. The danger of relying upon such decisions is apparent from the following passage occurring in the judgment of the learned Judge:

> "The scope of section 92 came up for consideration before the Full Bench in *Ramachandra Iyer* v. *Parameswaran Unni*[1] and the question before the Full Bench was whether a suit instituted, under section 92 of the Code of Civil Procedure with respect to temples in North Malabar is maintainable by a member of Dharma Rakshaka Sabha located at Madras, whose object is to institute suits for the protection and due application of the Hindu Religious Endowments".

When thesame matter was before a Division Bench earlier, Wallis, CJ. expressed the view

1. (1919) 36 M. L. J. 396: I. L. R. 42 Mad. 36(

that though Hindu temples can *prima facie* to be taken as having been dedicated for the use of all Hindus resorting to them a mere right to worship in the temple cannot be taken as indicating his interest in the trust and that any other conclusion would defeat the object with which the Legislature inserted the words in section 92 the object being to prevent people interfering by virtue of the section in the administration of the charitable trusts merely in the interest of others and without any real interest of their own. Kumaraswami Sastri, J., was however of the view that the right to worship in a particular temple is a sufficient interest in the temple to entitle a person to join in a suit under section 92. On a Letters Patent Appeal, the matter came before a Full Bench consisting of Abdur Rahim, Oldfield, and Coutts Trotter, JJ. In their majority judgment they held that the interest contemplated by section 92 of the Code of Civil Procedure is a resent and substantial interest and not a remote or fictitious or purely illusory interest and that a Hindu having a mere right to worship at a temple is not by reason of that alone, without more, competent to institute a suit for a scheme under section 92. Abdur Rahim J., in his minority judgment:- "however held that in the case of a Hindu temple or a Mohamadan Mosque persons resorting to them for the purpose of worship are personally beneficiaries intended by the founder and that such persons have an interest in the institution so as to enable them to invoke section 92. In *Md. Khan Sait* v. *Kadir Batcha*[1] Odgers and Madhavan Nair, JJ, held that in order to entitle a plaintiff to sue under section 92 he must have a clear interest in the particular trust over and above that which the general public has, that the words "interest in trust" must mean a present and substantial interest arising from some special relation in which the plaintiff stands to the trust in question as compared with the body of the religious community, and that though proof of residence in the neighbourhood of the institution may be relevant on the ground that those who live near the institution will be most likely to be benefited by the institution that is not conclusive. The Judicial Committee in *Vydianathan Ayyar* v. *Swaminatha Iyer*[1], however felt that "Muhammadans who worship regularly in a mosque in a village had a direct interest in the trust relating to the mosque though a bare possibility may not clothe them with an interest in the trust.

1. (1926) 23 L. W. 240 : A. I. R. 1926 Mad. 466.

6. In *Harhar Singh* v. *Gurudiam Singh*[2], the Supreme Court had to consider whether the plaintiffs belonging to Sikh religion but residing in the same village can file a suit under section 92 of the Code of Civil Procedure in relation to a non-Sikh institution running a free kitchen and serving free food to visitors. It had been urged on behalf of the plaintiffs that as residents of the village where the food is served free, they have got an interest in the institution so as to enable them to file a suit under section 92. Dealing with that contention the Supreme Court held, after referring to the judgment of the Full Bench in *Ramachandra Iyer* v. *Parameswaran Unni*[3], and the decision of the Privy Council in *Vydianathan Aiyar* v. *Swaminatha Aiyar*[1], that the plaintiffs as residents of the village had no such interest as could entitle them to institute the suit.

From this, it is clear that the learned Judge was influenced by the consideration that these deisions lay down that a person who is merely having a right to worship in a temple cannot be said to be person having an interest in the institution. On the other hand, the definition, in the present case, expressaly states the contrary. We have already extracted the definition; That expressly states that the term "person interested in a Wakf" includes "any person who has a right to worship or to perform any

1. (1924) I.L.R. 47 Mad. 884 : 20 L. W. 803: 471 M. L. J. 361 : 51 I A. 282 : A. I. R. 1924 P. C. 221 (2).
2. (1967) 2 S. C. R. 739 : A.I.R. 1967 S.C. 1415.
3. (1919) I.L.R. 42 Mad. 360 : 36 M. L. J. 396.

religious rite in a mosque ...". It is in view of this position only we have pointed out that the decisions bearing on the expression, *viz.*, "persons interested in the trust" occurring in section 92 of the Code of Civil Procedure, will have no bearing on the present controversy.

Further, the learned Judge has stated:-

> "If there had been no definition of 'a person interested in the wakf' as in section 3 (*h*) it would be possible to hold that respondents 2 to 5 (the appellants herein) have a real and distinct interest in the wakf so as to entitle them to invoke section 44 of the Wakf Act.
>
> But the said definition section appears to be restrictive in nature . . . . "

Here again, with respect to the learned Judge, we are unable to agree with him. The definition section, instead of being restrictive, is rather expensive and it includes not only a person who has a right to worship or perform any religious rite in a mosque, idgah, imambara, dargah, khangah, maqbara, graveyard or any other religious institution connected with thewakf, but includes a person who has a right to participate in any religious or charitable institution under the wakf. Consequently the definition of the term "person interested in a wakf" in section 3 (*h*) is very wide and hence we are of the opinion that the appellants herein, having regard to the defi ition and the terms of the wakf deed in question, fall within the definition section.

7. Independently of this, there is also a further reason for not prohibiting the wakf board from conducting the enquiry in the present case. Section 45 (1) of the Act reads as follows :

> "(*i*) The Board may, either on an application received under section 44 or on its own motion :
>
> (a) hold an inquiry in such manner as may be prescribed, or
>
> (b) authorise any person in this behalf to hold an inquiry into any matter relating to a wakf and take such action as it thinks fit."

This section enables the Wakf Board to hold an enquiry not only on an application made by persons interested, but also of its own motion. Therefore, even if it is assumed that the appellants herein cannot be said to be "person interested in the wakf", as defined in section 3 (*h*) of the Act, it does not mean that the Wakf Board had no jurisdiction to conduct the enquiry, because, the *suo motu* jurisdiction of the Board can always be exercised treating the applications made by the appellants herein as information brought to the notice of the Wakf Board necessitating the holding of an enquiry. Ramanujam, J., was aware of the power of the Wakf Board under section 45 of the Act, because, the learned Judge states towards the end of his judgment that what the learned Judge held with regard to section 44 would not mean that the Wakf Board cannot initiate *suo motu* proceedings under section 45 on the basis of the materials evailable before it and it was open to the Wakf Board to do so. If that is the conclusion of the learned Judge, it is rather difficult to understand how a writ of prohibition could issue against the Wakf Board preventing it from conducting the enquiry.

8. In view of the above circumstances, we are of opinion that the appellants herein come within the scope of the definition "person interested in the Wakf" in section 3 (*h*) of the Act and therefore were entitled to apply to the Wakf Board under section 44 of the Act for conducting an enquiry into the affairs of the Wakf in question, and even if they are not persons interested in the Wakf, as the Board has jurisdiction to conduct enquiry under section 45 treating the application of the appellants an information made

available to it, justifying its holding an enquiry into the affairs of the Wakf. We, therefore, allow both these appeals and set aside the order of the learned Judge and dismiss the writ petitions filed by the respondents. There will be no order as to costs.

R. S. —— *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :— *T. Ramaprasada Rao, CJ. and Natarajan, J.*

V. A. Ramraj and another ... *Appellants**

v.

The Collector of Central Excise, Madras and others. ... *Respondents.*

and

C. V. Ramaswamy ... *Appellant*

v.

The Collector of Central Excise, Madras and others ... *Respondents.*

Central Excise Rules (1944), rule 223-A—Central Excises and Salt Act (I of 1944), section 13—Warehouse—Taking of samples from, by excise officials whether permitted—Permissible in the course of check under rule 223-A—Power to confiscate includes power to take samples—Power to arrest expressly provided for in the Act itself.

In order to satisfy whether there has been an illegal removal and a consequential unauthorised substitution, the excise official in the course of his check under rule 223-A of the Central Excise Rules, 1944 would be right in taking a sample from the suspected substituted goods in order to satisfy himself whether there has been a violation of rule 151 (*c*) read with rule 144 of the Rules. [*Para.* 12.]

Notwithstanding the fact that there is no discrepancy in the weight as shown in the stock register, if a *bona fide* suspicion is entertained that there is a difference in quality in the goods found at the time of check compared with the goods whose description at the time of entry found in the stock register, then it appears that the statutory officials have the right to take samples. [*Para.* 12.]

The Central Excise Officials have the right to confiscate or seize the goods if, in their opinion, an offence has been committed by the warehouse-keeper. Such a large power would certainly include a lesser power of taking samples. [*Para.* 13.]

So long as the power of arrest is comprehensible under the provisions of the Act and is expressly provided for, then the Court cannot accept the contention of the appellants that no threat of arrest could be extended to them. [*Para.* 15.]

Case referred to :—

Ramalinga Choodambikai Mills Limited v. *The Government of India*, 88 L. W. 437 : A. I. R. 1975 Mad. 217.

Appeals under Clause 15 of the Letters Patent against the Order of Mr. Justice Koshal dated 10th December, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 4328, 4327 and 4698 of 1975 presented under Article 226 of the Constitution of India to issue Writs of Prohibition, prohibiting the respondents from taking any

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*W. As. Nos. 310 of 1976 and 30 and 31 of 1977. *14th August.* 1979.

further action or proceeding in pursuance of the samples of tobacco taken from the petitioners' in each of the petition warehouses (W. P. Nos. 4327 and 4328 of 1975) prohibiting the respondents from taking any samples of tobacco from any of the petitioners' warehouses at Chittode, Coimbatore District (W. P. No. 4698 of 1975) either in exercise of their powers under the Central Excise Act or Rules for taking any proceeding or criminally by arresting or prosecuting the petitioners or in any manner interfering with the petitioner's business of processing and reprocessing and sale of tobacco in his warehouse at Chittode.

T. S. Subramanian, for Appellant.

U. N. R. Rao, Senior Central Government Standing Counsel on behalf of Respondents.

The Order of Court was pronounced by

Ramaprasada Rao, CJ.—These three writ appeals are directed against the judgment of Koshal, J., who refused to issue a rule in the nature of a writ of prohibition, as against the respondents from taking any further action in pursuance of the samples of tobacco taken by the Excise Officials from the appellants' warehouse. W. A. No. 501 of 1976 is against W. P. No. 4328 of 1975, W. A. No. 30 of 1977 is against W. P. No. 4327 of 1975 and W. A. No. 31 of 1977 is against W. P. No. 4698 of 1975. The facts relevant for our purposes and which are almost similar in all the appeals can be referred to. Each of the appellants is a person holding a L-5 licence under the Central Excises and Salt Act, 1944, read with the Rules made thereunder. Under this licence, the petitioners were entitled to keep a bonded warehouse and store tobacco therein, maintain stock registers and be bound by the various Rules and regulations in the matter of storage of the tobacco which is admittedly excisable and for removal of such excisable commodity from the bonded warehouse. We are narrating the relevant facts in W. P. No. 4328 of 1975. The stock in the warehouse of the above petitioners was checked and weighed on 17th June, 1975. Though the entries in the stock books and accounts were found to be in order, on physical verification, an apprehension was entertained in the minds of the Excise Officials that in certain lots, the variety of tobacco found at the time of the check may not correspond to those that should have been actually in stock in the warehouse according to the description in the relevant stock records and other documents. Entertaining a suspicion that there has been an illicit removal and a clandestine replacement of an inferior quality of tobacco, samples were drawn from the stock in the warehouse on the date of inspection and, as is the common practice, the samples were examined by a trade panel for ascertaining whether or not the tobacco found in these lots were the same as the ones that should have been in stock as per the earlier description. Apprehending a further process of such investigation undertaken by the respondents, each of the writ petitioners has come to this Court for the issue of writ of prohibition from arresting or prosecuting the petitioner in furtherance of the analytical report on the samples taken and to prevent them from making such inspections as according to the petitioner, they are not authorised by law.

2. The main contention of the appellants is that there is no express power to take samples from unmanufactured tobacco in a bonded warehouse and, if a suspicion is entertained that there is a difference in quality of the tobacco found at the time of check with reference to the tobacco admittedly warehoused by a lawful permit, there is no authority or a specific rule which would empower the Excise Authorities to take samples therefrom, to take action against the warehouser. As it is the admitted case that an endorsement has been made on the date of check, that there are no discrepancies in the stock registers, no further action is possible merely because the Excise Authorities are subjectively satisfied that there is a difference in quality of the tobacco as compared to the stock found entered therein and action under

section 13 of the Central Excises and Salt Act, 1944, is not possible in law. It is also stated that, even if the power to take samples is traceable to any provision of the main enactment or the rules made thereunder, it is an uncanalised power vested in the respondents and it is therefore unreasonable and has to be struck down.

3. In the counter-affidavit it is stated that the action of the Department in having taken samples from the bonded warehouse is justified on the ground that, though duty is leviable on tobacco on the quantity removed from the warehouse, the Department is interested in ensuring that the tobacco received into the warehouse is properly accounted for and does not escape revenue and that no tobacco is illicitly removed or substituted by an inferior quality which is brought into the warehouse in order to keep the weight as disclosed. It is contended that the Department is enjoined to ensure that tobacco received into the warehouse is not illicitly removed by evading payment of duty and inferior quality of tobacco is brought into the ware-house in its place. It is said that they have the power under section 13 of the Central Excises and Salt Act read with rules 144 and 151 to take such action as is necessary in a particular case and according to circumstances and therefore it is said that the taking of samples is to achieve the object of the Act and in pursuance of the Rules made thereunder and such a provision not being unreasonable but in the interests of the revenue of the State is sustainable in law and the writ of prohibition sought for by each of the appellants is without any justification whatsoever.

4. Before considering the objections of the writ petitioners, it is necessary to refer succinctly to the Central Excises and Salt Act, 1944 and the Rules made thereunder. The Central Excises and Salt Act and the Customs Act of 1952 are twin enactments subserving similar objectives, the primary intendment of both being to check evasion of excise duty or customs duty. These enactments being quasi-fiscal and quasi penal in nature have to be interpreted strictly. Under section 12 of the Central Excises and Salt Act, the Central Government may by a notification in the Official Gazette declare that any of the provisions of the Customs Act relating to the levy of customs duty, warehousing, offences, confiscation procedure relating to offences, etc., shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3 of the Act. Under section 3 of the Central Excises and Salt Act, authority is given for the levy and collection in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India at the rates specified in the First Schedule. Column 4 of the First Schedule to the Central Excises and Salt Act refers to tobacco. Tobacco is explained as a commodity, which means any form of tobacco whether cured or uncured or whether manufactured or not and includes the leaf, stalks and stems of the tobacco plant A different scale of duty is prescribed for various varieties of unmanufactured tobacco. For example, for unmanufactured tobacco, if flue-cured and used for the manufacture of smoking mixtures for pipes and cigaretes the duty is Rs. 40. If it is other than flue cured and used for the same purpose it is Rs. 4. If the tobacco is used for agricultural purposes, there is no tax at all. We have referred to the above only to notice the variation in the rates of excise duty according to the quality of the tobacco. The Central Government has admittedly issued a notification under section 12 of the Central Excises and Salt Act declaring section 110 of the Customs Act of 1962 to be applicable to the levy of duty and exemption from duties etc., as adaptible to the Excise Act also but invocable according to the circumstances of each case. Section 110 of the Customs Act provides that if the proper officer has reason to believe that any goods are liable to confiscation under the Act, he may seize such goods. Section 13 of the Act confers a power on any Central Excise Officer duly

empowered by the Central Government to arrest any person whom he has reason to believe to be liable to be punished under the Act. Section 37 touching upon the rule-making power of the Central Government enables it to make any rules generally to carry into effect the purposes of the Act and in particular authorise and regulate inspection of factories and provide for the taking of samples and for the making of tests of any substance produced therein and for the inspection or search of place or... .for proper levy and collection of duties imposed by this Act on any excisable goods.

5. Rule 144 of the Central Excise Rules, 1944, imposes a ban on the warehouse-keeper not to take any goods out of the warehouse unless so permitted by the statutory authorities.

6. Rule 151 provides for offences with respect to warehousing. It says :

> "151. *Offences with respect to warehousing.*—If the owner of goods warehoused, or the warehouse-keeper, by himself or by any person in his employ or with his connivance, commits any of the following offences, ...
>
> (*a*) ......
>
> (*b*) ....
>
> (*c*) warehouses goods in, or removes goods from a warehouse otherwise than as provided by these rules . .
>
> (*d* .... "

he is said to have committed an offence and he shall be liable to a penalty; besides all the goods warehoused, removed or concealed in contravention of this rule shall be liable to confiscation.

7. Rule 223-A enables the Collector to take an account of goods in a warehouse at least once in every year. No doubt this rule lays an accent on the quantity warehoused but does not expressly refer to the quality of the goods.

8. It may be necessary also to refer to rule 56 which has been relied upon the learned counsel for the petitioners Rule 56 of the Central Excise Rules, 1944, provides for taking of samples for excise purposes. This rule is referable to goods which are manufactured or partly manufactured and taking of samples of any such goods. It permits the Officer to take samples of such goods and test them for purposes of ascertaining any infringement of the Excise Rules.

9. It is thus seen from an analysis of the provisions which are relevant for purposes of this case that throughout the texture of the Central Excise Act, runs a warp in the nature of lynx-eyed supervision by the authorities over the licence-holders and in particular the keepers of a bonded warehouse against removing dutiable goods without authority or warehouse goods in the bonded warehouse equally without such authority. In the context of the scheme of the Central Excise Act read with the Customs Act as set out hereinbefore it appears that the primary objective of the Excise Act hereinafter referred to as the Act, is to ensure that no loss of revenue is sustained by the State by reason of any activity irregularly or illegally committed by the warehouse-keeper. The irregularities and illegalities may occur in myriad ways. It is no doubt true that excise duty is levied on the weight of tobacco. But so long as it is not in dispute that there are varieties of tobaccos which are susceptible to varied rates of duty, it is not impossible to conceive that, if the warehouse keeper dexterously manages to keep the weight but substitutes the quality of tobacco to ensure such weight that operation also might end in a loss of revenue to the State. In order, therefore, to ensure that there is no such loss to the State, the Excise Officials functioning under the Act are enabled to inspect the warehouse from time to time. It may be that the stock register might not disclose any discrepancy in weight. But if in the course of inspection it is found that the quality of the tobacco found in the warehouse is different from the quality which went into the warehouse under a lawful permit, then also the Central Excise authorities do

have the power to act in accordance with law. We have already seen that section 13 of the Act enables the Central Excise Officer to arrest any person whom he has reason to believe to be liable to punishment under this Act. The punishment referred to in section 13 of the Act has to be read in conjunction with the intendment of the Legislature to penalise the licence-holder for any of the contraventions of the provisions of the Act or the Rules made thereunder.

10. Rule 144 of the Rules lays an embargo on the warehouse-keeper from removing the goods from any warehouse except on payment of duty.

11. Rule 151 of the Rules provides for the imposition of a penalty as also confiscation, if it is found that the warehouse-keeper or his agent warehouses goods in or removes goods from a warehouse otherwise than as provided for by these Rules.

12. Rule 223-A is a processual provision which envisages the levy of a penalty, where it is found that there is a deficiency in the weight of the commodity. The cumulative effect of these enforcement provisions which are quasi-penal in nature read with the object of the enactment which is to consolidate the law relating to Central Excise duties and which is factually statutory instrument preventing evasion of tax, is that there runs in the vein of this statute a power in the Excise Authorities to take such action as the circumstances of a case demands, in order to avoid evasion of tax. If, as in the instant case, a suspicion is entertained that the goods found at the time of the check are not the same as the goods which were warehoused at the time of the issuance of the lawful permit to house the goods, then the natural inference is that there has been a removal of the goods which were warehoused and a letting in of the goods which were not permitted. In order to satisfy whether there has been such an illegal removal and a consequential unauthorised substitution, the excise official in the course of his check under rule 223-A would be right in taking a sample from the suspected substituted goods in order to satisfy himself whether there has been a violation of rule 151 (*c*) read with rule 144 of the Rules. The excise official is exercising powers under a fiscal enactment. He may not, therefore, be expected to have the necessary expertise to render his opinion whether the alleged substituted goods are of the same quality as those goods which entered into the warehouse on a lawful permit. In order to secure an analytical report, the practice appears to be to call a committee of experts in the same trade to render an opinion thereon. This is neither an unreasonable method of ascertaining the quality of the goods in the warehouse, nor could it be said to be an illegal exercise of power in the Central Excise Official who is acting in the course of his investigation to detect an irregularity or illegality committed by the warehouse-keeper. Therefore, it follows that notwithstanding the fact that there is no discrepancy in the weight as shown in the stock register, if a *bona fide* suspicion is entertained that there is a difference in quality in the goods found at the time of check compared with the goods whose description at the time of entry is found in the stock register, then it appears to us that the statutory officials have the right to take samples.

13. We have already referred to the fact that the Officer has the power to confiscate goods if they entered into the warehouse without a lawful permit. The learned counsel, while conceding that the power of confiscation is vested in the statutory officials, would say that there is no power to take samples. The power to take samples is only a means to an end. It gives also an additional opportunity to the alleged delinquent to prove otherwise and establish that there has been no substitution of the goods. We are unable to agree that an officer who has the power to confiscate goods which, has found an illegal entry into the warehouse, cannot seize a much smaller quantity for purposes of substantiating that there has been a substitution in the goods. The substitution might result in evasion of tax because there are varied rates of duties

according to the quality of tobacco. Weight of course is one of the incidents for consideration but quality, having regard to the nature and variety of duties according to the quality of the tobacco, is also equally an essential ingredient to detect unauthorised substitution. It is in this context that reliance is placed upon rule 56. Rule 56 is a special rule touching upon the taking of samples of any manufactured or partly manufactured goods. The sense behind this Rule is easily understandable. In the case of a manufacturer, he may claim that certain excisable commodities have been used. In order to satisfy themselves that there has been a use of the authorised percentage of excised goods in the manufactured commodity, specific provision is made for sample of those goods. This would not however imply that the excise authorities in the course of their investigation who detect the commission of any offence, are precluded from taking samples of excise goods other than the manufactured goods.

We agree with Koshal, J., when he says :

> "In fact, it is not rule 56 which confers on the excise authorities the power to take samples. That Rule only regulates such power, which is conferred by the 1944 Act read with the 1962 Act and that power is the power of seizure which, as already stated by me, would include the lesser power of taking samples."

We have already referred to the fact that the Central Excise Officials have the right to confiscate or seize the goods if, in their opinion, an offence has been committed by the warehouse-keeper. Such a large power would certainly include a lesser power of taking samples.

14. The decision referred to by the learned single Judge as well as referred to before us reported in *Ramalinga Choodambikai Mills Limited* v. *The Government of India*[1], does not apply to the facts of this case. In fact, Ramanujam, J., in that case, should be understood to have said that, when the taking of samples is admittedly provided for in rule 56, then undoubtedly the excise authorities are competent to have the samples tested in order to subserve the purpose of taking of such samples. We are unable to hold that that decision is apposite for purposes of our case. We are concerned with a case where the excise officials, instead of confiscating the entire suspected substituted goods, adopted a step-in-aid thereto, by taking samples in order to investigate further to find whether there has been such an improper substitution. We are, therefore, satisfied that the taking of samples in the peculiar circumstances of this case is authorised under the Act and the said power is neither unreasonable or untrammelled.

15. The next point urged is whether the excise officials could arrest a person. This power is expressly provided for in section 13 (1) of the Act. If the excise official has reason to believe that the petitioners had substituted goods lying in their warehouse without the permission of the excise authorities and if, according to their belief they differ from the goods which were earlier permitted, then the excise officials are duly empowered to arrest the person involved in such an activity. The apprehensions entertained by the appellants are that there was a threat of arrest. So long as the power of arrest is comprehensible under the provisions of the Act and is expressly provided for, then we are unable to accept the contention of the appellants that no threat of arrest could be extended to them.

16. The last but feeble contention of the learned counsel for the appellants was that analysis of the samples by a panel of traders, who are in fact competitors in the profession is unauthorised. As pointed out by Koshal, J., it is for the authorities to determine as to what sort of evidence would be sufficient to support the intended prosecution or further statutory action. If the prosecution is laid on the basis of the opinion of the panel and if the Court accepts it, then the appellants can have no complaint. The methodology to be adopted by the investigating agency in order to sustain their conviction and belief

1. 88 L. W. 437: A. I. R. 1975 Mad. 217.

that an offence has been committed under the Central Excise Act cannot be challenged in these proceedings.

17. The writ of prohibition is an extraordinary writ which could be asked for only in cases where there is a total absence of jurisdiction in the authority to take action or where there is an open excessive exercise of such jurisdiction. Neither of these two primordial conditions which would prevent an authority from taking action under the appropriate acts of Legislature are present here. In fact, we have found that the Central Excise Officials have the right to confiscate the goods, if they suspect any unauthorised entry of substituted goods into the warehouse and they have also the concurrent right to arrest the delinquent, if they have a reasonable belief that an offence under the Act has been committed and, therefore the writ of prohibition as sought for was rightly refused by the learned Judge.

18. These writ appeals fail and they are dismissed. There will be no order as to costs.

The following Order of the Court was made by

Ramaprasada Rao, CJ.—Learned counsel for the appellant seeks for leave to appeal to the Supreme Court against our judgment. In our judgment we have dealt with the provisions of the Central Excise Act and the Customs Act, which are self-explanatory, and our decision is based on the interpretation of those provisions. The subject-matter, in our opinion, does not raise any substantial question of law of general importance, which has to be decided by the Supreme Court. Accordingly we see no reason to grant leave.

S. J. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: — *V. Ramaswamy, J.*

Kothandaraja Pillai ... *Appellant**

v.

Piramadesam Village, Viswakula Street, Swamy Viswa Vinayakar Kovil by its Trustee and others ... *Respondents.*

Deed — Construction — Settlement by lady having woman's estate in favour of temple—Retention by settlor of life interest subject to liability to light oil lamps everyday in the temple—Reason for settlement, salvation of her soul—Self-imposed ban on alienation during her lifetime—Validity.

The self-imposed ban under the settlement deed on alienation of the suit property during the settlor's lifetime could only be on the basis that she had settled the property on the temple as otherwise it would be otiose. The ban brings out her intention in settle absolutely. The settlor dealt with the property as if it was her own and wanted to efface her entire interest in favour of the temple reserving only a right to enjoy the income from the property subject to a further liability to meet the expenses of lighting a lamp daily in the temple from and out of such income during her lifetime. This is a present disposition subject to reserving certain rights of enjoyment to the extent of the excess income that remains after paying the Government taxes and other dues and also meeting the lighting expenses. Though the settlor had only life interest there was a present disposition of the property by way of endowment though possession was postponed till the death of the settlor. Such disposition being for pious and religious purposes was binding on the alienees of the property. The temple therefore had title to the suit property and it was entitled to file the suit for a declaration of its title.

[*Para.* 6.]

* S. A. No. 738 of 1977.

14th November, 1980.

Case referred to: –

Khublal v. *Ajodhava*, (1916) I. L. R. 43 Cal. 57.

Appeal against the decree of the Court of the II Additional Subordinate Judge, Tirunelveli in Appeal Suit No. 11 of 1976, preferred against the decree of the Court of the District Munsif Ambasamudram in Original Suit No. 778 of 1976.

R. Srinivasan, for Appellant.

T R. Mani and *S. Chandramouli*, for Respondent.

The Court delivered the following

JUDGMENT. — The fourth defendant is the appellant. The first plaintiff is a temple represented by its trustee the second plaintiff. Plaintiffs 5 to 6 are the worshippers. The plaintiffs have filed the suit for a declaration that the suit properties are owned by the first plaintiff temple and for recovery of possession with mesne profits. The case of the plaintiffs was that the suit properties were originally owned by one Chidambara Asari. He died leaving his widow and a son and on the death of her son, the widow succeeded to the entirety of the properties. While thus in possession and enjoyment, she executed a settlement deed on 9th December, 1931, endowing the properties in favour of the first plaintiff-temple retaining a life interest in herself but subject to the condition that she was under a liability to light the temple with one lamp everyday at an annual cost of Rs. 5. The suit properties which were two items were the subject-matter of attachment and sale in execution of decree against Vadivammal the widow of Chidambara Asari. The life interest in item No. 1 was purchased by one Subbiah Konar from whom defendants 1 to 3 claim some right in the same. Since that item of property is not the subject-matter in the second Appeal, no further details need to be mentioned relating to the same. The second item was sold in execution of another decree and was purchased by one Peramu Ammal. There were successive sales of this property and ultimately the fourth defendant had purchased the same on 26th October, 1968. On the death of Vadivammal, the present suit has been filed for a declaration of the title on the basis of the settlement deed dated 9th December, 1931.

2. The fourth defendant contended that Vadivammal had only a life estate in the property and she had no right to settle the property or endow the same in favour of the temple, which will enure beyond her lifetime. Any creation of an interest in favour of the temple, which will enure beyond the lifetime of Vadivammal will be invalid. On the construction of the settlement deed, the fourth defendant also contended that there was no present disposition of Vadivammal's life estate and if the document is to be construed as an endowment to take effect after the death of Vadivammal, it would be invalid as an endowment of a person who had no absolute estate in the property. If settlement deed was thus not valid, the plaintiffs not being reversioners as such the suit is not maintainable.

3. Both the Courts below held that even though Vadivammal had only a life interest there was a present disposition of the entire property in favour of the temple by way of an endowment and such disposition being for pious and religious purposes it was valid and binding on the fourth defendant and those who purchased the property in Court auction.

4. At this stage we may refer to the relevant recital in the document dated 9th December, 1931. After stating as to how Vadivammal came into possession and enjoyment of the property after the death of her husband and son, the document stated :

"... Since I have no other heirs and with a view to attain salvation of my soul, I shall pay a sum of Rs. 3 per annum from out of the income of the schedule property for lighting a lamp daily in the temple of Sami Visva Vinayagar situated in Brahmadesam Kammalar Street during my lifetime.

I have endowed the schedule property to the aforesaid Sami Vinayagar by my enjoying same during my lifetime without alienating the same in any manner.

After my lifetime, the five persons namely (1) Gopalan Asari son of Sudalaimuthu Asari (2) Sami Asari son of Sudalaimuthu Asari (3) Velayutham Asari son of Chockalingam Asari (4) Andi Asari son of Arunachalam Asari (5) Arunachalam Asari son of Alangaram Asari, residing in the aforesaid street shall perform daily abishegam (Bathing the deity) decoration, neivedyam (offering of food) and deepam (lighting of lamp) to the aforesaid Visva Vinayagar with the balance amount of income from the Schedule property after paying the Government tax permanently for ever hereditarily".

On the construction of the document, Mr. Kesava Iyengar, the learned counsel for the appellant strenuously contended that there was no disposition by way of an endowment in favour of the temple and despite a self imposed restraint on alienation, she remained the owner of the property and at best it should be construed only as a partial dedication to the extent of Rs. 3 per annum.

5. There could be no doubt that Vadivammal had woman's estate known to Hindu law and she could dispose of a reasonable portion of the estate for religious and pious purposes. It may be mentioned that though the settlement deed covered the entire properties of the settlor, item No. 2 in only 10 cents and even the other item, which is not the subject-matter of the Second Appeal is stated to be only 46 cents of dry land. Since no spliting of the estate is possible being small portions we have to uphold the validity of the gift on the principle that a widow is entitled to dispose of the property for pious and religious purposes. In this case the document recites that she executed the same with a view to attain salvation to her soul". In *Khublal* v. *Ajodhava*[1], Justice Mukherjee on the point as to whether a religious act, for which the alienation is made, could be said to be conducive to the spiritual welfare of the husband pointed out that according to a text of Brihaspati the husband and the wife participate in the effects of good and bad action and their mutual relation was not dissolved by the death of either partner. The position thus as pointed out in the text book, Hindu Law of Religious and Charitable Trusts by Mukherjee, Fourth edition comes to this, that whatever secures religious merit to the wife is spiritually efficacious to the husband as well. The disposition by Vadivammal therefore could not be questioned if really there was a fractional disposition under the settlement deed in favour of the temple.

6. The contention of the learned counsel is that there was a partial dedication to the extent of Rs. 3 per annum and it may be even construed as a charge to the extent of Rs. 3 per annum on the estate but it could not be construed as an endowment as such. According to the learned counsel, there is no extinction or cessation or termination of the settlor's interest in the property despite the self-imposed restraint on alienation and that therefore, no valid title was vested in the temple. If the endowment is to be construed as to take effect subsequent to the death it is also not valid. I am unable to agree with the learned counsel that there is no present disposition or endowment in favour of the temple. The document is in vernacular and a translation of a relevant portion has been already extracted. The ban imposed under the document on alienation during her lifetime could only be on the basis that she had settled the property on the temple as otherwise it would be otiose.

1. (1916) I. L. R. 43 Cal. 57.

This ban in other words brings out the intention to settle absolutely. She dealt with the property as if it is her own and wanted to efface her entire interest in favour of the temple reserving only a right to enjoy the income from the property subject to a further liability to meet the expenses of lighting a lamp daily in the temple from and out of such income during her lifetime. This in my view is a present disposition subject to reserving certain rights of enjoyment to the extent of the excess income that remained after paying the Government taxes and other dues and also meeting the lighting expenses. Therefore I agree with the Court below that there was an endowment though possession was postponed till the death of the settlor. The temple therefore had title to the property and it is entitled to file the suit for a declaration of its title. There are no grounds to interfere with the findings of the Courts below. The second appeal accordingly fails and is dismissed. But there will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Shanmukham, J.*

Sudalai Muthu Pillai ... *Appellant**

v.

Santhanam ... *Respondent.*

Indian Partnership Act (IX of 1932), section 69 (1) and (3) (a) — Scope — Unregistered agreement of partnership — Suit for recovery of specific sum of money against the other partner — Not maintainable.

Section 69 (3) (*a*) of the Partnership Act, shows that notwithstanding the prohibition contained in section 69 (1) an unregistered partnership agreement could be enforced for obtaining only three reliefs and no more:

(*i*) to apply for dissolution of the firm and for accounts;

(*ii*) to ask for accounts of a dissolved firm; and

(*iii*) to realise the property of the dissolved firm.

The present action for recovery of a specific sum of money from the other partner as framed would not come under the first two of the categories abovesaid. As to whether it will be within the third category, the reference to the power to realise the property of the dissolved firm in section 69 (3) (*a*) can be only for the benefit of the other partner or partners but not for one's individual benefit. In such a suit the partner or partners should also be made parties. This is a safeguard envisaged under the sub-section to enable any partner of the dissolved firm, in case of non-co-operation from any other partner, to recover from the third party the property of the dissolved firm for the benefit of all the partners. Even a strained interpretation of the said clause can hardly import the meaning that the third category embraces a case where the partner of the dissolved firm can sue the other or others for a specific sum of money. The relief should be one for accounts of the dissolved firm under the second category, but not for recovery of a specified sum. [*Para.* 2.]

Cases referred to:

Basantilal Jalan v. *Chiranjilal Saragi*, A. I. R. 1968 Pat. 96; *Navinchandra Jethabhai* v. *Moolchand Sundaram Gendodiya*, A. I. R. 1966 Bom. 111.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 238 of 1972, preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 2154 of 1971.

*S. A. No. 1419 of 1977.

21st November, 1980.

K. Raman, for Appellant.

V. C. Srikumar, for Respondent.

The Court delivered the following

JUDGMENT:—This second appeal raises a nice question of law arising under the Indian Partnership Act (hereinafter referred to as the Act).

The short facts necessary for the occasion are as follows:

(1). The suit is for the recovery of Rs. 4,750 on the allegation that under the agreement between the parties, the plaintiff should invest Rs. 3,000 and the defendant Rs 1,000 for purchasing types and other materials required for the business of printing the voters' list and that after defraying the expenses in regard to wages, rent, etc., they should share the profit. The plaintiff's case is that even on the date of agreement, he had paid Rs. 3,000 to the defendant and that after providing for all expenses, there could be a net profit of Rs. 2,000. The defendant received Rs. 4,011 and Rs 591.78 from the Government.

(2). The defence is that as the agreement Exhibit A-1 is a partnership agreement and as the same is not registered as per mandate in the Act, the suit agreement cannot be enforced; the defence on merits is total denial of payment of Rs 3,000 by the plaintiff to the defendant. Further, according to the defendant, the joint venture ended in loss of Rs. 1, 169.29.

(3). The learned District Munsif of Dindigul in O. S. No. 2154 of 1971 construed Exhibit A-1 as a simple agreement, but not a partner ship deed requiring registration under the Act, while in A. S. No. 238 of 1972, the learned Subordinate Judge of Dindigul held that it is a partnership deed and that therefore, it cannot be enforced in a Court of law for want of registration under the Act. The appellate Court also held on the merits that the plaintiff did not in fact contribute Rs. 3,000 differing from the trial Court. A. S. No. 238 of 1972 by the defendant was, therefore, allowed and the suit was dismissed.

1. It is urged on behalf of the appellant-plaintiff that the view of the appellate Court regarding the enforceability of Exhibit A-1 is erroneous. In support of his contention, the learned counsel for the appellant referred me to section 69 of the Act, particularly to section 69 (3). It is useful to extract section 69 :

> "69. (1). No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm."
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect–
>
> (*a*) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or ......

and the rest is omitted as not relevant for the present occasion. It is plainly patent from section 69 (3) (*a*) that the disability created under section 69 (1) is no legal impediment to a party to the contract in enforcing the unregistered partnership arrangement for the dissolution of a firm or

for accounts of a dissolved firm or for realisation of the property of a dissolved firm. Had the learned Subordinate Judge noticed the above sub-section, I think, he would not have ventured to hold that Exhibit A-1 is unenforceable in law for any purpose. Such a finding, therefore, cannot be sustained in law and is, therefore, set aside.

2. Yet, I find the appellant cannot sustain the relief as claimed in his suit. For, the suit is for recovery of a specific sum. A careful reading of section 69 (3) (*a*) will point out that notwithstanding the prohibition contained in section 69 (1), an unregistered partnership arrangement could be enforced for obtaining three reliefs and no more; the three reliefs are :-

(*i*) to apply for dissolution of the firm and for accounts;

(*ii*) to ask for accounts of a dissolved firm; and

(*iii*) to realise the property of the dissolved firm.

The present section as framed will not come under the first two categories above said. Then, the question is, whether the relief claimed by the appellant could be brought within the ambit of the third category. The natural and plain meaning of section 69 (3) (*a*) in relation to "the power to realise *the property of the dissolved firm*", in my opinion is so explicit as to refer only to the right inhered in any partner of the dissolved firm for the benefit of the other partner or partners, but, not for his individual benefit. It is needless to state that in such a suit, the other partner or partners should also be made parties. In my opinion, this is a safeguard envisaged under the sub-section to enable any partner of the dissolved firm in case of non-co-operation from any other partner to recover from the third party the property of the dissolved firm for the benefit of all the partners. Even, a strained interpretation of the said clause can hardly import the meaning that the third category embraces a case where a partner of the dissolved firm can sue the other or other for a specific sum of money. I am, therefore, of the view that the relief should be one for accounts of the dissolved firm under the second category, but, not for recovery of a specified sum. It is relevant to notice here the two diverse positions taken by the rival parties. Above all, even according to the plaintiff, it is only his assessment of profit, but admittedly, not arrived at on proper account-taking. Taking of accounts assumes greater importance in this case as one would allege a profit, while the other would plead a loss. It was not argued before me that Exhibit A-1 is not a partnership arrangement. It is, therefore, demonstrably clear that the remedy available in law, was to have asked for the accounts of the dissolved firm on the facts of this case, which is expressly provided for in section 69 (3) of the Act.

3. The decision in *Basantilal Jalan* v. *Chiranjilal Saragi and others*[1], relied on by the learned counsel for the appellant does not at all support his above contention. It can be seen from the very opening sentence of the reported judgment that the relief sought for in that case was "for recovery of Rs. 3,400/- *or any such sum as may be found due on accounting of the partnership business with the defendant*" (Italics is mine). It is, therefore quite clear that there was no occasion for the learned Judges to consider the question as it has presented before me. So too, the other decision in *Navinchandra Jethabhai and another* v. *Moolchand Sundaram Gindodiya*[2], is not an authority for the proposition that a partner of a dissolved firm can sue the other or others for a specific sum of money. For, all that the learned Judges held was "giving a natural meaning to the provisions of clause (*a*) which are applicable to the case of an unregistered firm, a suit for accounts of a dissolved firm or for realisation of the property of a dissolved firm from any person, whether he be a partner or not, can be filed".

4. I, therefore, hold that the suit as framed is not maintainable.

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1. A. I. R. 1968 Pat. 96.
2. A. I. R. 1966 Bom. 111.

5. The other point urged by the learned counsel for the appellant is that the finding of the lower appellate Court that the plaintiff did not invest Rs. 3,000 cannot be supported on the available materials. I was taken through the judgment of the first appellate Court in contrast with that of the trial Court. But, the learned Subordinate Judge had explained as to why he could not agree with the learned District Munsif. I do not find any error of law or irregularity in the learned Judge's approach which would adversely affect his finding. A very great emphasis in made on the absence of specific denial in Exhibit A-1, the respondent's lawyer's reply to Exhibit A-2. While in Exhibit A-4, it is alleged that on the date of Exhibit A-1 the appellant invested Rs. 3,000 the respondent in his lawyer's reply has stated that as the appellant failed to invest in time, the respondent did not carry out the work in time and consequently, had suffered loss. This was interpreted by the learned counsel to imply the appellant's investment if not on the date of Exhibit A-1, but sometime later. It is sufficient for me to point out that even such interpretation does not support the plaintiff's case of payment on the date of Exhibit P 1. It is well laid down that the plaintiff should not be allowed to give up his case as set out in his plaint and to rest his claim on the defence. Thus, this finding of the lower appellate Court is unchallengeable.

6. The result is that the second appeal fails and is dismissed, but without costs.

R. S. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Ratnam, J.*

The Management, Balajee Cotton Mills Ltd., Salem ... *Appellant**

v.

M. C. Manickam .... *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 3 (1)—The expression "wilful disobedience". diametrically opposed to the idea of "accident"—Workman meddling with a running machine, in spite of warning board in Tamil and sustaining injury—Not entitled to compensation.

Where injury had not resulted in the death of a workman, provisos (*a*) and (*b*) to section 3 (1) of the Workmen's Compensation Act; would apply, proviso (*b*) (*iii*) to section 3 (1) relied on in the present case exonerates the employer from liability for injury caused by an accident, if the injury had not resulted in the death of the workman. In addition there must be a wilful disobedience of an order or rule by the workman and such order or rule must have been made and framed expressly for the purpose of securing the safety of the workman and the accident is directly attributable to such wilful disobedience. The use of the expression "wilful disobedience" comprehends within its scope a deliberate and intended disobedience and involves the doing of something with the knowledge or certainty that it is likely to result in a serious injury or with a reckless disregard of the consequences. In other words, the idea intended to be conveyed by the use of the expression "wilful disobedience" is that it is diametrically opposed to the idea of "accident". [*Para.* 4.]

The accident in the present case having taken place as a result of meddling with a

*A. A. O. No. 493 of 1979. *6th August*, 1980.

running machine, it is obvious that the warning that a running machine should not be meddled with, prominen ly displayed in Tamil in the place of work, had been disregarded. The circumstances also establish the disobedience of the rule because even according to the respondent he was aware of what is likely to happen if there was an attemapt to clean the mchine while running and in spite of it, he had done so without switching off the machine before cleaning. This indicates that the rule that a running machine should not be meddled with had been deliberately flouted by the respondent and the accident certainly cannot, therefore be attributed to a mistake in the mode of performing a particular task. It is evident that the respondent was not only fully aware of the consequences of his intended act, but had been warned by the prominent display of the order that a running machine should not be meddled with but in spite of it the respondent chose to clean the cording machine, while it was running which brought about the accident. In other words the respondent, had, by his own imprudent act, invited the accident and, therefore, cannot claim compensation from the employer on the footing that the injury had been sustained in spite of his obedience to the order or warning given that a running machine ought not to be meddled with.

[*Para.* 5.]

Cases referred to:

Mackinnon Mackenzie & Co., Ltd. v. *Ibrahim Mahommed Issak*, (1970) 2 S. C. J. 106: (1970) 1 S. C. R. 869: (1970) 1 Lab. L. J. 16: A. I. R. 1970 S. C. 1906; *Arya Muni* v. *Union of India*, (1965) 1 Lab. L. J. 24.

Appeal against the Order of the Court of the Additional Commissioner for Workmen's Compensation, Coimbatore, dated 20th August, 1979 and made in W. C. Case No 50 of 1978.

K. R. Vijayakumar and *T. C. Suresh*, for Appellant.

Row and *Reddy*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal under section 30 (1) of the Workmen's Compensation Act, 1923 at the instance of the management of Balaji Cotton Mills Limited against the order of the Additional Commissioner for Workmen's Compensation, Coimbatore, dated 20th August, 1979 in W. C. No. 50 of 1978. The respondent herein filed the petition under section 10 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act) claiming compensation from the appellant in respect of an injury stated to have been sustained by him. According to the respondent, he was a workman employed by the appellant and that on 4th February, 1978, while working and cleaning the cording machine, his right hand was pulled into the machine and was crashed and cut off upto the arm which necessitated amputation of the right hand below the shoulder level. Claiming that his monthly wages earned amounted to Rs. 156 the respondent claimed a compensation in a sum of Rs. 18,816.

2. This claim of the respondent was resisted by the appellant principally on two grounds. The first was that the respondent approached the appellant management to provide him an opportunity to learn the work in the mill as an apprentice and he was so permitted to join as an apprentice without wages and as such, the respondent was not a workman within the meaning of section 2 (1) (*n*) of the Act. In addition, the appellant pleaded that warning notices with instructions not to interfere with the running machines and expressly prohibiting the same had been exhibited in all the sections of the mill and that the respondent meddled with the cording machine while it was running by cleaning it with a gunny piece and thereby exposed himself to peril in utter disregard of the instructions given and brought about the injury by his own act and consequently, under proviso (*b*) (*ii*) to section 3 (1) of the Act, the appellant will not be liable in any manner.

3. The Additional Commissioner for Workmen's Compensation framed the following two points for decision (1) whether the respondent is a worker or not, and (2) whether

the accident was due to wilful disobedience of the respondent On the first point, the Additional Commissioner for Workmen's Compensation, held, relying upon the statement of the respondent, that he was a workman as defined under section 2 (1) (*n*) of the Act. As regards the second point it was held that the accident was not due to the wilful disobedience of the petitioner/respondent herein. Calculating the compensation on the basis of a daily wage of Rs. 6 the compensation was fixed at Rs. 18,816 and the appellant was directed to pay this amount to the respondent. It is the correctness of this order that is challenged in this civil miscellaneous appeal.

4. The learned counsel for the appellant raises two contentions. Firstly, it is contended that the respondent was an apprentice and not a workman within the definition of the Act. The second contention is that even on the footing that respondent would fall within the definition of a workman under the Act, yet, by reason of the wilful disobedience on his part of the instruction not to meddle with a machine when working, intended to secure the safety of the workman, the employer would not be liable. Per contra, the learned counsel for the respondent contends that the respondent is a workman as defined under the Act and therefore, the accident had taken place in the course of such employment. In addition, it is also contended that having regard to the circumstances under which the accident had taken place, a general awareness on the part of the respondent that if he meddles with a machine he is likely to be injured will not suffice, unless the management is in a position to establish that specific instructions in this regard had been given and those instructions have been disregarded. It is unnecessary to go into the merits of the first contention as it is common ground that even if the respondent is held to be a workman under the Act, the employer/appellant may not be liable, if the respondent had wilfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing the safety of the workmen. In order to appreciate the contention raised in this behalf, it is necessary to notice the relevant statutory provision. Section 3 (1) of the Act in so far as it is necessary for considering this question runs thus :

> "3 (1). If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :
>
> Provided that the employer shall not be so liable :
>
> (*a*) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;
>
> (*b*) in respect of any injury not resulting in death, caused by an accident which is directly attributable to - -
>
> (i) the workman having been at the time thereof under the influence of drink or drugs, or
>
> (ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen; or
>
> (iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen."

As stated earlier, the respondent had sustained the injury in the course of his employment. Since the injury had not resulted in the death of the workman, provisos (*a*) and (*b*) to section 3 (1) of the Act would apply. Proviso (*b*) (*iii*) to section 3 (1) relied on in the present case exonerates the employer from liability for injury caused by an accident, if the injury had not resulted in the death of the workman. In addition, there must be a wilful disobedience of an order or rule by the workman and such order or rule must have been made or framed expressly for the

purpose of securing the safety of the workmen and the accident is directly attributable to such wilful disobedience. The use of the expression "wilful disobedience" comprehends within its scope a deliberate and intended disobedience and involves the doing of something with the knowledge or a certainty that it is likely to result in a serious injury or with a reckless disregard of the consequences. In other words, the idea intended to be conveyed by the use of the expression "wilful disobedience" is that it is diametrically opposed to the idea of "accident". It is in this context that the evidence placed before the Additional Commissioner for Workmen's Compensation has to be scrutinised. The respondent who has been examined has stated thus :

> "ஓடற மெஷினில் போய் meddle பண்ணினால் பயங்கர விளைவு ஏற்படும் என்று எனக்குத் தெரியும். மெஷின் ஓடும் போது தான் துடைத்தேன் .... என் அஜாக்கிரதையால் ஏற்பட்ட சம்பவம். அதனால் நட்ட ஈடு தரவேண்டியதில்லை என்றால் தவறு. மெஷினை off பண்ணி விட்டு தான் துடைக்கணும். அன்று மெஷினை ஆப் பண்ணி துடைக்கவில்லை. ...."

A reading of the above evidence of the respondent in the course of his cross-examination, clearly reveals that he was aware of the consequences of meddling with the carding machine while running and that though that machine should be cleaned only after switching it off, he attempted to clean it without so doing. The evidence of the partner of the appellant indicates that there is a board put up that the machine should not be touched and that nobody should attempt to clean the machine while it is running and it was only on account of the carelessness of the respondent that the accident had taken place. In the course of the order, the Additional Commissioner for Workmen's Compensation also refers to the production of the warning board in Tamil in addition to the records and it is thus obvious that a warning board in Tamil, with which the respondent is well acquainted, had been put up to indicate that it is dangerous to meddle with the running machine. It must also be borne in mind that a mill employee like the respondent must be aware of the consequences that are likely to result if he should meddle with a machine which is working. If the accident had occurred owings to a reason which can be termed as an incident of the employment, then, the claim for compensation must succeed, unless, of course, it is established that the workman had exposed himself to a danger or peril by his own imprudent act. This is pointed out by the Supreme Court in *Mackinnon Mackenzie and Co., Ltd.* v. *Ibrahim Mahommed Issak*[1], The learned counsel for the respondent strongly relies upon the decision reported in *Arya Muni* v. *Union of India and others*[2] and contends that the requirements to exonerate the appellant from liability in the circumstances established in the present case have not been made out. Particularly, considerable reliance is placed upon the fulfilment of the following requirements :

(1) that an order or rule was already in force at the time when the accident happened;

(2) the purpose of that rule or order was that of securing the safety of workman;

(3) the order or rule was couched in term and in words which indicated clearly the purpose;

(4) that the terms thereof were brought to notice of the workman injured;

(5) the order or rule was disobeyed by the workman;

(6) the disobedience of the rule or order was wilful and deliberate and not the result of negligence or a mistaken mode of doing a particular task; and

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1. (1970) 1 S. C. R. 869: (1970) 2 S. C. J. 106 : (1970) 1 L. L. J. 16 : A. I. R. 1970 S. C. 1906.
2. (1965) 1 L. L. J. 24.

(7) the accident was directly attributable to the disobedience.

5. It is admitted even by the respondent that the carding machine should not be cleaned while it is running and an order or instruction that such a running machine should not be cleaned is undoubtedly intended for the safety of the workmen. That there was a board in Tamil warning the workmen to desist from meddling with the running machine is also established by the evidence of the partner of the appellant and by the production thereof before the Additional Commissioner for Workmen's Compensation. It is not the case of the respondent that he was unacquainted with Tamil and that he was unaware of what was written in the board. Indeed, the respondent had admitted that dangerous consequences will ensue, if he should meddle with a running machine. The accident having taken place as a result of meddling with a running machine, it is obvious that the order that the running machine should not be meddled with prominently displayed in Tamil in the place of work, had been disregarded. The circumstances also establish the disobedience of the rule because even according to the respondent he was aware of what is likely to happen if there was an attempt to clean the machine while running and inspite of it, he had done so without switching off the machine before cleaning. This indicates that the rule that a running machine should not be meddled with had been deliberately flouted by the respondent and the accident certainly cannot, therefore, be attributed to a mistake in the mode of performing a particular task. It is obvious that the accident was directly attributable to the disobedience of the instructions, or the order as otherwise the accident would not have happened if the machine had been stopped and cleaned as it should be done. It is, therefore, evident that the respondent was not only fully aware of the consequences of his intended act, but had been warned by the prominent display of the order that a running machine should not be meddled with; but in spite of it the respondent chose to clean the carding machine, while it was running, which brought about the accident. In other words, the respondent had, by his own imprudent act, invited the accident and, therefore, cannot claim compensation from the employer on the footing that the injury had been sustained in spite of his obedience to the order or warning given that a running machine ought not to be meddled with. Under these circumstances, it is not possible to sustain the order passed by the Additional Commissioner for Workmen's Compensation awarding compensation to the respondent. That order is, therefore, set aside and the C. M. A. is allowed. No costs.

R. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT;—*S. Nainar Sundaram, J.*

S. Balasubramaniam *Petitioner**

v.

Gulab Jan ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act (XVIII of 1973) — Sub-tenant — Status under the Act—Petition for eviction against original tenant—Tenant remaining ex parte—*Contest by sub-tenant — Disputing* bona fides *of landlord to obtain possession—No allega- of fraud or conclusion between the main tenant and landlord—Sub-tenant whether can defeat the provision of eviction by landlord.*

If the landlord makes out a case for eviction under the Act XVIII of 1960, against the main tenant, the sub-tenant cannot have any voice in such a contingency and has to abide by the decision in the action taken by the landlord against the tenant. The sub-tenant cannot put-forth any grievance since the Act confers upon him no protection whatever and his right to be in possession is in the very nature of things,

*C. R. P. 1624 of 1979. *5th December*, 1980.

very nebulous and is a defeasible right. In the present case, the sub-tenant had not put forth and substantiated any plea of collusion between the landlord and the main tenants. Section 26 of the Rent Control Act is only an enabling provision and it does not affect the well-established principle that a sub-tenant has no independent right of his own to be protected under the Act and in the absence of contest by the main tenant for valid reasons and in the absence of fraud or collusion between the landlord and the main tenant, it is not permissible for the sub-tenant to stultify the proceeding for eviction by the landlord by putting forth any independent contest of his own. In this case it must be presumed that the main tenant found no justifiable and vital excuse or ground to contest the petition for eviction by the landlord and in the said circumstances, it is not within the competency of the sub-tenant to put forth a contest and nullify the proceedings for eviction by the landlord.

[*Para.* 10.]

Cases referred to :—

Devaraja Bhatt v. *V. S. Raja*, (1952) 2 M.L.J. 179 : 65 L. W. 654 : A. I. R. 1953 Mad. 356 ; *Rupchand* v. *Raghuvanshi*, (1965) 2 S. C. J. 584 : (1964) 7 S. C. R. 760 : A. I. R. 1964 S. C. 1889 ; *Ramanatha Iyer* v. *Bathul Bai*, (1971) 2 M. L. J. 383.

Petition under section 25 of the Tamil Nadu Act XVIII of 1960 as amended by Tamil Nadu Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge, the Nilgiris at Ootacamund, dated 10th February, 1978 and passed in C. M. A. No. 38 of 1977 against H. R. C. No. 115 of 1976, on the file of the Rent Controller the Nilgiris at Gudalur.

N. Sivamani and *N. K. Mitra*, for Petitioner.

K. Ramaswami, A. Sarojini Bai and *S. Rangarajan*, for Respondent.

The Court delivered the following

JUDGMENT.—In this revision, the landlord within the meaning of the Tamil Nadu Buildings (Lease and Rent Control) Act, (XVIII of 1960), hereinafter referred to as "the Act" is the petitioner. The respondent herein is the sub-tenant. The landlord filed a petition, H. R. C. No. 115 of 1976 on the file of the Rent Controller of Nilgiris, Gudalur, for eviction under section 10 (2) (*i*) for wilful default, section 10 (2) (*ii*) (*a*) for sub-letting and section 14 (1) (*b*) for demolition and reconstruction under the Act, against five respondents of whom the respondent herein was the fifth. Repondents 1 to 4 before the Rent Controller were the legal representatives of one Ahamed Hussain, who was the original tenant of the premises in question. Respondents 1 to 4 before the Rent Controller, the legal representatives of the original tenant and who assumed the character of tenants within the meaning of the Act, remained *ex parte* and did not contest the petition for eviction. The sub-tenant, the respondent herein, alone contested. According to him, the sub letting was done with the consent of the previous landlord Palaniswami Pandaram, who has gifted the property to the present landlord on 25th September, 1972 ; he has been paying the rents to the previous landlord Palaniswami Pandaram because he had no notice of the transfer of ownership ; and the previous landlord earlier obtained an order of eviction on the same ground of demolition and reconstruction and since there was failure to demolish within the time given by the Court, even after obtaining the possession of the premises, restitution has been obtained and the proceedings are barred under section 19 of the Act. The contest of the sub-tenant was considered by the Rent Controller. He held that there was no wilful default and that the sub-tenancy was with the consent of the previous landlord. However, the Rent Controller upheld the case of the landlord on the question of his requirement of the premises for demolition and reconstruction and ordered eviction. The bar under section 19 of the Act pleaded by the sub-tenant was not countenanced by the Rent Controller. The chief tenants, respondents 1 to 4, before the Rent Controller, did not take up the matter in appeal. The sub-tenant alone preferred an appeal, C. M. A. No. 38 of 1977 before

the Subordinate Judge of the Nilgiris at Ootacamund. The Appellate Authority reversed the finding of the Rent Controller on the question of the landlord's requirement of the premises for demolition and reconstruction and held that there was lack of *bona fides* on the part of the landlord and allowed the appeal, dismissing the petition for eviction. The present revision is directed against the judgment and decree of the Appellate Authority.

2. Mr. N. Sivamani, learned counsel for the petitioner, would primarily urge that the chief tenants having not contested the petition for eviction, the sub-tenant has no *locus standi* to contest the petition for eviction and thwart the move by the landlord to obtain possession. The learned counsel would further submit that even otherwise, the bar under section 19 of the Act would not apply because the present petition for eviction has the backing of the new cause of action and the tests to be applied under section 14 (1) (*b*) of the Act get amply satisfied and hence the landlord is entitled to the order of eviction.

3. The primary question to be decided is as to whether the respondent herein, the sub-tenant, has got any status under the Act so as to put forth any individual contest and defeat the proceedings for eviction by the landlord.

4. A similar question under the Madras Buildings (Lease and Rent Control) Act (XV of 1946) arose for consideration by a Division Bench of this Court consisting of Govinda Menon and Krishnaswami Nayudu JJ. in *Devaraja Bhatt* v. *V. S. Raja*[1] and Govinda Menon, J, speaking for the Division Bench, observed that :—

> "Under the Madras Buildings (Lease and Rent Control) Act a sub-tenant as such is not recognised and if a landlord brings a suit in ejectment a sub-tenant let into possession cannot raise any question and submit that he has a status under the Act which should be safeguarded by its provisions".

5. Construing the provisions of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), Rajamannar, C. J. and Venkatarama Ayyar, J., expressed the view that the right given by section 7 (1) of the said Act in expressly given to the tenant and the definition of tenant in section 2 (4) of the Act does not include a person placed in occupation of a building by its tenant; and section 7 (1) cannot on a proper construction apply to a sub-tenant and confer rights on him and he cannot get the benefit indirectly on the ground that he claims under the tenant. They also considered the effect of the Explanation added by Act VIII of 1951 which run as follows :—

> "A tenant who sub-lets shall be deemed to be landlord within the meaning of this Act in relation to the sub-tenant".

They held that the effect of the Explanation is certainly not to enable a sub-tenant to raise an objection to being evicted by the landlord either under the provisions of the Rent Control Act or otherwise, as for example, in execution of a decree for possession; and the expression "tenant" in section 7 (1) would not include a sub-tenant in relation to the original landlord. This Bench referred to the dictum of the earlier Bench in *Devaraj Bhatt* v. *V. S. Raja*[1],

6. The question came up for a comprehensive consideration by the Supreme Court in *Rupchand* v. *Raghuvanshi*[2] and the facts of that case may be shortly stated as follows :

7. A landlord brought a suit against his lessee for ejectment after serving a valid notice to quit but without impleading the sub-lessee as defendant. The lessee did not contest the suit in pursuance of his agree-

1. (1952) 2 M. L. J. 179: 65 L. W. 654: A. I. R. 1953 Mad. 356.

1. (1952) 2 M. L. J. 179: 65 L. W. 654: A.I.R. 1953 Mad. 356.
2. (1965) 2 S. C. J. 584: (1964) 7 S. C. R. 760: A. I. R. 1964 S. C. 1889.

ment with the plaintiff landlord and an *ex parte* decree was passed. The sub-lessee thereupon brought a suit against the landlord and the lessee for a declaration that he was not bound by the decree which had been obtained by collusion between the defendants in order to injure the plaintiff and to evict him from the premises without a decree being passed against him. The suit was dismissed on the ground that the plaintiff failed to establish collusion.

8. The Supreme Court held that the suit was rightly dismissed and the mere fact that the sub-lessee was not impleaded or that the lessee did not actually contest the suit did not render the decree passed in the suit as collusive especially when it was not suggested by the sub-lessee that the lessor had even a plausible defence to the claim for ejectment. Collusion in judicial proceedings was defined by the Supreme Court as a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. It was further held that where the landlord institutes a suit against the lessees for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessees as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate; the decree in such a suit would bind the sub-lessee; this may not act harshly on the sub-lessee, but this is a position well understood by him when he took the sub-lease, the law allowed this and so the admission cannot be said to be an improper act; the mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion; and it is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded.

9. The general law permits the lessor to obtain a decree for possession against the lessee, which decree cannot be stultified by the sub-lessee on the simple ground that he was not made a party to the proceedings for the reason that the sub-lessee has no superior right to remain in possession over that of the lessor to obtain possession. The right of the sub-lessee is a derivative one and it is defeasible and depends on the right of the lessee, through whom he obtains and is in possession. If the lessor could rightly obtain possession from the lessee, the sub-lessee could not stand in the way irrespective of the fact whether he was made a party or not to the proceedings for possession by the lessor. These principles cannot be lost sight of. It may not be necessary to cite multiple judicial precedents in reiteration of this well accepted position in law.

10. In the instant case, no material is placed before the Court to indicate that the main lease was for any particular term. On the other hand, the plea is that the main lease itself is only oral and is from month to month. In such a contingency, the main tenant is only entitled to the protection under the Act namely, the statutory right to continue in possession subject to the provisions of the statute. If the landlord makes out a case for eviction under the Act against the main tenant, the sub-tenant cannot have any voice in such a contingency and has to abide by the decision in the action taken by the landlord against the main tenant. The sub-tenant cannot put forth any grievance since the Act confers upon him no protection whatsoever and his right to be in possession is, in the very nature of things, very nebulous and is a defeasible right. In the present case, the sub-tenant has not put forth and substantiated any plea of collusion between the landlord and the main tenants respondents 1 to 4 before the Rent Controller. Section 26 of the Act is only an enabling provision and it does not affect the well established principle that a sub-tenant has no independent right of his own to be protected under the Act and in the absence of contest by the main tenant for valid reasons and in the absence of collusion or frand between the landlord and the main tenant, it is not permissible for the sub-tenant to stultify the proceedings for eviction by the landlord by putting forth any independent contest of this own. If the position is understood in the above light, I

am unable to countenance the stand of the sub-tenant, the respondent herein, against the proceedings for eviction by the landlord. As observed earlier, there is no proof of collusion or fraud by the landlord and the main tenants. Hence, it must be presumed that the main tenants found no justifiable and valid excuse or ground to contest the petition for eviction by the landlord and in the said circumstances, it is not within the competency of the sub-tenant, the respondent herein, to put forth a contest and nullify the proceedings for eviction by the landlord.

11. Even on merits, I am of the view that the Appellate Authority acted with impropriety and irregularity when it negatived the case of the landlord. I find that the bar under section 19 of the Act pleaded by the sub-tenant, the respondent herein, has not been dealt with by the appellate authority. The earlier proceedings for eviction on the ground of demolition and reconstruction at the instance of the previous landlord terminated in 1972. Exhi bit A-1 is a notice dated 24th August, 1974, ssued by the Executive Officer, Gudalur Town Panchayat, Gudalur, Nilgiris, to the present landlord and the body of the notice runs as follows :

> "இம்பிரியல் பூட் ஹவுஸ் குடியிருக்கும் திரு. எஸ். பாலசுப்ரமணியத்திற்கு சொந்தமான 10/258 கதவு எண் உள்ள கட்டிடம் மிகவும் மோசமான நிலையிலுள்ளதாக தெரிய வருகிறது அக்கட்டிடத்தின் சுவர்களில் அநேக இடங்களில் வெடிப்பு விழுந்து மழை காரணமாக சுவரிலுள்ள சிமன்டெல்லாம் போய் இருக்கிறது. அத்துடன் அக்கட்டிடம் பஜார் ஏரியாவிலுள்ளதாலும், கடையாக இருப்பதாலும் அது விழுந்தால் அந்த வழி நடக்கும் பிரயாணிகளுக்கும் கடைக்கு வரும் நபர்களுக்கும் ஆபத்தாகும். எனவே ஷெ வீட்டை இந்நோட்டீஸ் கிடைத்து 7 நாட்களுக்குள் அதில் குடியிருப்பவர்களை காலி செய்து கட்டிடத்தை இடிக்காவிடில் டிஸ்டிரிக்ட் முனிசிபாலிட்டி ஆக்ட் 1920 செக்ஷன் 218 (3) படி நடவடிக்கை எடுக்கப்படும் என்பதை அறிவிக்கப்படுகிறது."

The contingency is a new one and would definitely amount to change in circumstances. In *M. K. Abdul Majid Sahib* v. *T. Mohammed Ismail*[1], Suryamurthi, J., dealt with a similar situation. There, the previous proceedings, terminated in March, 1973 and the notice by the Municipality to the owners of the building directing them to demolish the building came to be issued on 15th November, 1973. The learned Judge held that this cause of action, which was not available to the landlords when the previous proceedings were initiated, had arisen after the previous proceedings were terminated and the position based on the new cause of action was maintainable.

12. Exhibit A-1 notice speaks for itself and it shows that the building in question is in a dangerous condition; the walls thereof have developed cracks; the cement plastors have worn out and the building stands the risk of falling down endangering the life of pedestrians passing through. The marking of this document has not been objected to and the genuineness of the document does not appear to have been questioned at all by the sub-tenant, even assuming that he has got the competency to contest the position for eviction. Yet, the Appellate Authority seems to feel that the landlord ought to have placed further proof as to the condition of the building.

13. Another grievance put forth by the sub-tenant, the respondent herein, is that no sanction has been obtained for demolition and reconstruction. In the face of Exhibit A-1, it will be redundant to insist upon the obtaining of sanction for demolition for reconstruction. It cannot be laid down as a general rule that in all cases of demolition and reconstruction, prior sanction should have been obtained. The existing condition of the building being as borne out by Exhibit A-1, it will amply justify the action of the landlord and substantiate his *bona fides*. As pointed out by Ramanujam, J., in *Ramanatha Iyer* v. *Bathul Bai*[2], the Act nowhere provides that a petition for

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1. C. R. P. No. 665 1976, dated 18th August, 1976.
2. (1971) 2 M. L. J. 383.

demolition and reconstruction should be made only after getting the required sanction from the authorities concerned.

14. The capacity and means of the landlord to carry out the work of demolition and reconstruction do not appear to have been challenged in the present proceedings. Want of sanctioned plan or lack of preparations for the work of demolition and reconstruction by itself cannot negative the *bona fides* of the landlord. Each case will have to be decided on its own facts. Under certain circumstances, it is futile to expect the landlord to make the preparations for demolition and reconstruction on the fond rope of succeeding in his proceedings for eviction. To insist upon such a factor as a *sine qua non* for initiation of proceedings for eviction on the ground of demolition and reconstruction would drive the landlord to incur expenditure which may turn out to be futile depending upon the ultimate result in the proceedings for eviction. In my view, Exhibit A-1 clinches the issue and lends ample support to the case of the landlord for demolition and reconstruction.

15. For all the above reasons, I am obliged to interfere in revision and accordingly, the revision is allowed, the judgment and decree of the Appellate Authority are set aside and the petition, H. R. C. No. 115 of 1976 on the file of the Rent Controller, Nilgiris, Gudalur, for eviction is ordered directing the respondent therein (including the respondent in this revision) to deliver possession of the premises in question within six months from today.

16. The landlord, the petitioner herein, shall commence the work of demolition of the building in question not later than one month and shall complete the work of demolition before the expiry of three months from the date he recovers possession of the said building.

17. There will be no order as to costs.

R. S. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T Sathiadev, J.*

K. R. Padmavathy Ammal (died) and others ... *Petitioners**

v.

E. R. Manickam ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (2) (ii) (b) *and section 21 — Building originally residential — Alteration of structure of building and conversion into non-residential by landlady — Tenant using it as non-residential — Petition for eviction on the ground of conversion liable to be dismissed.*

For conversion of a building which was residential on the date of the coming into force of the Act XVIII of 1960, necessary permission has to be secured in writing from the Controller under section 21 of the Act. Without such a written consent if any building had been converted for non-residential purposes, under section 31 any person who contravened the provision is liable to be punished with a fine of Rs. 200. In this case, there was no evidence that prior to the tenancy granted in favour of the respondent, the premises was being used as a non-residential premises. It was the landlady who knowingly had allowed the building to be used for non-residential purposes. For contravention of section 21, depending upon the facts and circumstances of each case, it may be either the landlord or the tenant who may be prosecuted, and in some cases both of them also may be prosecuted. If, after securing the premises for residential purposes the tenant is to convert the premises for non-residential purposes, in such cases the tenant alone will be punished. If both of them being fully aware that it is a residential

* C. R. P. No. 1881 of 1977. *31st October, 1980.*

premises later on have it converted as non-residential by the landlord altering the structure of the building and the tenant using the building as a non-residential premises, then both of them would be prosecuted. [*Para.* 26.]

The evidence disclosed that this was not a case where the tenant took it for residential purposes, and later on converted it. He was put into the premises by the landlady for using it for non-residential purposes. Such being the case it is only the landlady who will be liable for prosecution. As held in *Rahimkhan* v. *Khurshid Ahmed and others* (1975) 2 S. C. J. 178 : (1974) 2 S. C. C. 660 : A.I.R. 1975 S. C. 290 : and *Shankarlal* v. *Jagadishwar Rao*, (1980) 1 An W. R. 1 the contravention, if any, would not take away the right of the tenant to claim the benefits under the Act as a tenant. Therefore the tenant has a right to resist the petition for eviction by stating that having rented out the building for non-residential purposes, it will not be open to the landlord to ask for it for residential purposes. [*Para.* 27.]

The only hurdle the landlady faced in this case was that the premises having been let out for non-residential purposes, she cannot disturb such a tenancy, till it comes to an end, and, the tenant having acquired statutory rights to resist the recovery of possession of the property, unless it be for non-residential purposes. It is only if the landlady requires it for non-residential purposes she can maintain this petition. In this case though the claim is not for additional accommodation but is a petition for eviction on the ground of wilful default, in view of the conversion of the building and user for different purposes and for personal occupation, and the absence of provision for enabling the landlord to ask for recovery of possession for residential purposes of a premises having let it out for non-residential purposes, the present petition is not maintainable. By her conduct the landlady had allowed a statutory right to be acquired by the tenant for the use of the premises for non-residential purposes though the landlady had violated section 21 of the Act by not securing the written permission of the Controller for such conversion. Hence the right of the tenant to resist the petition filed for recovery of possession for residential purposes is not taken away, rather, the landlady having contravened section 21 of the Act cannot maintain this petition. [*Para.* 29.]

Cases referred to:—

Sri Rajalakshmi Dyeing Works v. *Rangaswami*, (1980) 2 R. C. J. 165: A. I. R. 1980 S.C. 1253; *D. Dakshinamoorthy* v. *Dhulja Bai*, (1952) 1 M. L. J. 390: I. L. R. (1952) Mad. 651: 65 L. W. 242: A. I. R. 1952 Mad. 413; *Busching Schmitz* v. *Menghani*, (1977) 2 S.C.C. 835: (1977) 3 S. C. R. 312: A. I. R. 1977 S. C. 1569; *D. B. Godse* v. *Ramachandra Iyer*, A. I. R. 1955 Mys. 107; *Gopal Dass Verma* v. *Dr. S. K. Dhardwai*, (1961) 2 S.C.J. 616: (1962) 2 S.C.R. 678: A.I.R. 1963 S. C. 337; *Gapalbhai Mohanabhai* v. *Mahilashakari Udyog Mandir*, (1976) 2 S. C. J. 266: (1975) 2 S.C.C. 492: (1975) R. C. J. 616: (1976) 1 S.C. R. 411: A. I. R. 1975 S. C. 2128; *Muralidhar Agarwal* v. *State of U.P.*, (1975) 1 S. C. J. 178: (1975) 1 S. C. R. 575: (1974) 2 S. C. C. 472: A. I. R. 1974 S. C. 1924; *Shankarlal* v. *Jagadishwar Rao*, (1980) 1 An. W. R. 1: (1979) 2 A.P.L.J. 284: (1979) 2 An. L. T. 298: (1980) 1 R. C. J. 618; A. I. R. 1980 A. P. 181; *Trikkamchand Mithalal Jain* v. *M. R. Narasimhachari*, (1980) 1 M. L. J. 522; *Nagamma* v. *Madala*, (1952) 1 M. L. J. 158: 65 L. W. 1185: A. I. R. 1954 Mad. 165; *Rahim Khan* v. *Khurshid Ahmed*, (1975) 2 S. C. J. 178: (1974) 2 S. C. C. 660: A. I. R. 1975 S. C. 290; *Ms. M. Thirupati Nadar and Sons* v. *Dr. S. L. Kantha Rao*, 1980 T. L. N. J. 145.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Chengalpattu dated 30th June, 1978 and made in C. M. A. No. 165 of 1975 (R. C. O. P. No. 46 of 1973 Rent Controller cum Prl. DM Poonamallee)

M. N. Padmanabhan and *D. Mukundan*, for Petitioners.

R. S. Venkatachari, for Respondent.

The Court delivered the following

JUDGMENT.—The landlady is the petitioner. She filed the petition under section 10 (2) (*i*) on the ground of wilful default; under section 10 (3) (*a*) (1) requiring the premises, for her

own use and occupation; and under section 10 (2) (*ii*) (*b*) since the tenant has converted the premises for a different use, namely for non-residential purpose, when the tenancy was only for residential purpose, and therefore liable to be evicted under Tamil Nadu Act XVIII of 1960.

2. In her petition, she stated that the premises bearing Door No. 24, North Part Street, Venkatapuram, Ambattur was let out to the tenant for a monthly rental of Rs. 200 and that the premises is required for her own use and occupation as she does not own any other house, and that it was let out only for residential purpose by the petitioner, but the tenant has now started using the premises for non-residential purpose, namely for a laundry which causes nuisance and inconvenience to the neighbours, and that he has not paid rent for the months January to March, 1970, for March, 1971 and February, 1973, in all for a period of five months aggregating to Rs. 1,000 and also a sum of Rs. 80 for the month of April, 1970. Thus in all, a sum of Rs. 1,080 remains to be paid and in spite of issue of lawyer's notice on 1st February, 1973, determining the tenancy by the end of February, 1973, he had avoided delivering possession of the property. The claim that he has spent about Rs 20,000 in the premises is false and no such improvements have been effected. No advance to the extent of Rs. 3,000 as claimed, was ever received by her.

3. In the counter-statement filed by the tenant, who is the respondent herein, he claimed that there was no jural relationship of landlord and tenant between himself and the petitioner herein, and that it was only her husband who leased out the premises to him and the tenancy commenced in the middle of December, 1969 but later on treated as one of an English Calendar month. He has also stated that he has paid a sum of Rs. 3,000 by way of advance to the husband of the petitioner on the specific understanding that the premises is to be used for dry cleaning and laundry purpose and it was only on this understanding, a high rent of Rs. 200 was fixed for this premises, and the present claim that it was let out for residential purpose is a deliberate lie, whereas originally the premises was taken on lease only for the conduct of the business in dry cleaning and the claim that he has not paid rent is false for the months mentioned by the petitioner, as her husband had received those payments and that he has not committed any wilful default as claimed by her, and that the petitioner is not in need of the premises as she has moved to the city for education of her children, and there is no *bona fides* in the claim, and that he has spent nearly Rs. 20,000 for the construction of an overhead tank, cloth washing tank, cloth boiling stove and latrine and towards other improvements and it was only when he refused to pay enhanced rent, the present petition has come to be filed.

4. The petition for eviction was filed on three grounds. On the ground of wilful default, pleaded, both the authorities had come to the conclusion that the alleged wilful default is not true. On the second ground that the tenant had converted the premises from residential to non-residential premises, both the authorities have concurrently held that this claim is baseless, and that the tenant has not used the building for a purpose other than the purpose for which it was let out.

5. It is only on the aspect of '*bona fide*' requirement for the use and personal occupation of the landlord, that the Rent Controller held in her favour, whereas the Appellate Authority held that this claim is not entertainable on the ground that having let out premises for non-residential purpose, she is not entitled to require the premises for residential purpose and therefore rejected her petition.

6. Aggrieved against this order, this civil revision petition is filed under section 25 of the Act.

7. Mr. Sivamani, counsel for the petitioner-landlady contends that the appellate authority was in gross error in holding that the premises was let out only for non-residential purpose, when factually the building was used only for residential purposes at the time of letting out, the structural features of the building being fit only for residential purposes and when the building was a residential building at the time when the Act XVIII of 1960 had come into force. Unless an order had been secured, under section 21 of the Act for conversion in law, for the purposes of the Act, it has to be treated only as a residential premises, and admittedly when the respondent is using it for non-residential purposes, it will not be open to treat the tenancy as one for non-residential purposes, and reject the petition on the ground that the landlady cannot ask for residential purpose because the premises by illegal conversion is being used for non-residential purposes. He would further contend that no court can encourage a violation of a statutory provision in that when in law the premises can be treated only as a residential premises, even if the landlady had entered into a transaction of lease to let out the premises for non-residential purposes, the tenant cannot take advantage of such a lease arrangement, because both of them will be liable to be prosecuted under section 31 of the Act and the lease transaction is void, and the parties will be bound to treat the building as a residential premises, and accordingly relief has to be granted irrespective of whatever might be the consent given by the landlady for the building to be used as non-residential premises assuming that she had given such a consent. In this case, on the evidence on record, it is quite clear that the premises was let out only for residential purposes and it was only the tenant who had later on converted it to non-residential purpose and that the concurrent findings arrived at by the two authorities being erroneous and contrary to evidence on record, cannot be sustained by this court, whose jurisdiction under section 25 of the Act is of the widest amplitude.

8. Subsequent to the filing of the petition, her nine children have almost completed their education and there is no need for her to stay in the city, and therefore there is *bona fides* in her claim for demanding possession of her own premises when she is not possessed of any other property in the city. As to the other findings regarding wilful default, he would state that the claim had been rejected on flimsy grounds.

9. The main aspect to be considered is whether the conversion pleaded is true or not. Both the authorities have concurrently held that the conversion pleaded is untrue and originally the building had been let out for non-residential purposes and the tenancy started from January, 1970. Petitioner's husband P. W. 1, has spoken about a portion of the property having been let out on a monthly rent of Rs. 100 p. m. In his evidence, he would state that the premises was used for residential purpose and that it had been let out to the respondent on a rent of Rs. 200 and he was asked to remit the rents in the Bank itself. He came to know about the laundry being conducted in the premises only in 1977, and before that he had not seen the premises, as he had gone to Bombay for his work, and that his wife continued to live at Madras with the children. He admits that under Exhibit B-1, dated 16th February, 1971, he had demanded Rs. 250 as rent and the letter had been addressed in the name of the laundry. Further he would state that apart from the building portion, a vacant site of about 2 grounds belonging to him had also been fenced as one property, and it has been rented out as one unit. In Exhibit B-2 dated, 26th June, 1972, a letter written by him, he has demanded enhanced rent of Rs. 50 by stating that Sumathi Industries are asking for higher rate of rent. He was aware that the respondent was having laundry business in other places. Of the nine children, only two are studying presently in High School, and the rest of them had completed their education. Therefore the premises is immediately required for personal occupation. He never received any advance, nor the improvements claimed, have been made and the premises was let out only for residential purposes and not for any trade purposes. No written consent had

been taken for any such conversion. He is the sole witness for the petitioner. The tenant had examined himself as R. W. No. 1 and he claimed that he took the premises for laundry business and for having a show-room, and at that time, he was employed in Tube Products as a worker earning a salary of Rs. 250 and at the same time, he was also having laundry shops in two other places and he wanted to open a shop at Ambattur. He took the premises along with the vacant site fenced together after negotiation held with the husband of the petitioner, and that he was asked to pay a sum of Rs. 5,000 as advance. He paid only Rs. 3,000 and settled the transaction. The premises had only a single phase electric connection and conversion was made to a three phase connection, which is required for operating laundry equipments. Though, he had not secured the written consent, in the application, petitioner's husband has signed the letter for grant of licence. It is untrue to claim that the premises was taken for residential purposes because with his meagre salary and on what he was earning from the laundry business in other places, he was not a person who could afford to pay a sum of Rs. 2,00 p. m. by way of rent solely for residential occupation. The husband of the petitioner, having received the rents, has come forward to falsely claim that the rents have not been paid. Extensive improvements have been made and he has spent nearly Rs. 20,000 and at this stage, when the premises is a non-residential one, the laundry cannot be asked for residential purposes. He was informed that the petitioner is willing to sell the property on the plea that in Ambattur Township, she intends to build a house and the present claim in made only for renting out the premises for a higher rent, and there Is no *bona fide* in the claim For the purpose of carrying out laundry business and for washing clothes in open yard, he has engaged sixteen persons of which 12 persons are in the premises itself and they cook ande at. From 1970 onwards licence had been issued not only for a three phase electric supply but also for carrying on the laundry business, and all these facts have been fully known to the petitioner and her husband.

10. A Commissioner was appointed for ascertaining the nature of improvements made and he has reported about the location of rooms and the extent to which improvements have been made, and that the premises was being used for non-residential purposes. He can make out two rooms used as kitchens and that the premises consist of two portions, one on the west and one on the east and has been constructed for the residence of two tenants. Six rooms were being used for laundry and three rooms are used for the residence of the respondent, and in the vacant backyard, there are concrete tables, tubes and other things which are used for laundry business and three phase electric connection had been provided.

11. On such evidence, Mr. Sivamani contends that the premises is structurally a residential one and it could have been rented out only for residential purposes and merely because the tenant had subsequently taken three phases electric connection and has made some improvements, it could not mean that at the inception the tenancy was for non-residential purpose. He contends that the concurrent findings of the two authorities that there was no conversion by the tenant, are incorrect and erroneous. There is no evidence to the effect that prior to the tenancy in favour of respondent, the premises was let out for any non-residential purpose. Hence the tenancy was only for residential purpose.

12. Mr. R. S. Venkatachari for the respondent would state that whatever be the nature of enjoyment of the property prior to the tenancy in favour of the respondent, there is clinching evidence that knowingly the premises was let out for non-residential purposes and no one would pay Rs. 200 for this premises, unless it be for non-reseidential purposes. R. W. 1 had statnd, that the monthly rent was only Rs. 75 and if it has to be utilised for laundry purpose' the rent will be Rs. 200.

13. The evidence on record goes to show that the premises though structurally a residential one, has been utilised for laundry purposes and for the said purpose, it cannot be said that such a building cannot be utilised. The open yard of nearly two grounds has been utilised for washing clothes. Hence the nature of the property can easily fit in for the purpose for which it is claimed to have been taken on lease About the existence of relationship of landlady and tenant. there is no dispute. Petitioner's husband had come foward to state that he had claimed higher rent under Exhibit B-1 stating that some other industry is asking for higher rent and hence Rs. 250 per month has to be paid. His claim that only in 1977 he knew about the laundry business being carried on, is untrue. He has written Exhibit B-1 on 16th February, 1971, addressed in the name of the laundry.

14. When the notice for eviction had been issued in 1973, to plead that he had seen the premises only in 1977 is unbelieavble. The petitioner was quite conscious of the purpose for which the premises was being used. She was aware of the purpose to which it was to be used at the time of letting out of the property. This is an aspect on which, on the evidence on record, the two authorities have concurrently held against the petitioner. Immediately after taking possession of the property, the tenant had applied for three phase current and has also secured the licence for running a laundry. P. W. 1 had signed in the letter addressed for grant of licence. Therefore on the evidence adduced, the concurrent finding arrived at by the two authorities does not call for any interference

15. Apart from what can be said on consideration of evidence, Mr. R. S. Venkatachari by relying upon the decision in *Sri Rajalakshmi Dyeing Works* v. *Rangaswamy*[1], would plead that while exercising powers under section 25 of the Act, this Court cannot function as a second court of first appeal. In that decision dealing with the scope of section 25 of the Act it is held that despite the wide language employed in section 25 the High Court should not interfere with the findings of fact merely because it does not agree with the findings of the subordinate authority and the power conferred under section 25 of the Act may not be as narrow as the revisional power of the High Court under section 115 of the Code of Civil Procedure, but it is not wide enough to make the High Court a second Court of first appeal, and the concurrent finding based on evidence cannot be in erfered with by merely holding that the question involved is a mixed question of fact and law.

16. In this case, the concurrent finding arrived at by the authorities is based on evidence which has been adverted to above and there is no warrant for interference with such a concurrent finding in the light of what has been held by the Supreme Court. The concurrent finding being to the effect that there was no conversion by the tenant subsequent to the lease transaction and that the premises was let out for non-residential purpose, the contention raided by Mr. Sivamani on this aspect has to be rejected.

17. The matter cannot be concluded on this aspect alone, because Mr. Sivamani has further contended that when the premises was a residential one, at the time when the Act came into force and was so at the time when it was let out, the tenant cannot claim that it is a non-residential premises and therefore the landlady cannot seek to recover it for residential purposes Even if the tenancy was for non-residential purposes, when both the parties have violated the provisions of the Act by not securing the permission under section 21 of the Act the tenant cannot rely upon such a transaction and resist the eviction proceedings.

18. In support of this contention, he relies upon the decision in *D Dakshinamoorthy* v. *Thulja Bai*[1]. This decision was rendered

1. (1980) 2 Ren. C. J. 165 : A I R. 1980 S. C. 1253.

1. I. L. R (1952) Mad. 651 : (1952) 1 M. L J. 390 : 65 L. W. 24 : A. I. R. 1952 Mad. 413.

in a matter that arose under Act XXIX of 1949. The 'user' of the property down to the date of the filing of the petition and of an acquiescence by the landlady is one of the tests to find out whether the lease is for residential or non-residential purposes. In a case where there is evidence of user, but no evidence of acquiescence, then the structural design and the antecedent user as known to the tenant and the surrounding circumstances can be taken into account if the building is capable of both residential and non-residential purposes. On determination of the question of fact, the main and dominant purpose of letting out, has to be made out. Where at the inception, it is only a residential building it may become a non-residential building by force of the terms of the letting and any conversion after the letting of such a building into a non-residential one, can take place only by following what the statute prescribes. Therefore Mr. Sivamani would contend that the concurrent finding which is relied upon is not based on proper or relevant factors, and the user itself is no longer conclusive one in view of the decision in *Busching Schmitz* v. *Menghani*[1], wherein it was held while dealing with the provisions of Delhi Rent Control Act, that the use or purpose of the letting is no conclusive test, and hence in this case, the use of the property by the tenant for laundry purposes, cannot be taken into account, and therefore there was an error in appreciation of the evidence by the two authorities.

19. *D. B. Godse* v. *Ramachandra Iyer*[2], is relied upon to contend that it is not for the tenant to state that the family does not require the premises and that they may continue to live in the same place for the education of the children, for which purpose they have originally gone to Madras. In determining *bona fides*, the desire of the landlady for her own purposes, cannot be rejected by pointing out that the purpose for which the landlady had moved out, has since ceased to exist.

1. (1977) 2 S. C. C. 835 : (1977) 3 S. C. R. 312 : A.I. R. 1977 3 S. C. 1569.
2. A. I. R. 1955 Mysore 107.

20. Mr. R. S. Venkatachari contends that if in spite of what has been held in *Rajalakshmi Dyeing works* v. *Rangaswami*[1], this Court is to go into the question of finding out as to whether the building is a residential one or a non-residential one, the authorities have not decided about the nature of tenancy by subsequent user, but have chosen to hold that even at the inception, the premises was let out only for non-residential purposes, and the land-lady was fully aware of the same when negotiations took place through her husband.

21. On the aspect as to whether a residential premises can be converted as a non-residential one, this is not a case where subsequent to the tenancy, the tenant has converted the user of the property, but right from inception, he had been put in possession of the property for non-residential purposes. Therefore the landlady can no longer contend that the structural aspect of the building is of a residential type or that it was being used as a residential one, and therefore even though the letting out was for non-residential purposes. for the purpose of proceedings under Act XVIII of 1960, it has to be deemed to be only a residential building.

22 On this aspect, he relies upon the decision in *Sri Gopal Dass Verma* v. *Dr. S. K. Dhardwai*[2], wherein it was held that if the landlord has acquiesced in the tenant using the premises let out initially for residential purpose both for residential and professional or non-residen- or commercial purposes, later on the landlord cannot object on the ground that the property is being put to a different use Once acquiescence is made out, the landlady cannot plead that the tenant is liable to be evicted, because the premises is no longer used exclusively for residential purposes.

23. In this case, even at the inception the premises was let out only for non-residential purposes, and all these years, to the full knowledge of the landlady a laundry was being conducted. and having let out the property

1. (1980) 2 R.C J 165 : A.I. R. 1980 S. C. 1253.
2 (1961) 2 S. C. J. 616 : (1962) 2 S. C. R. 678 ; A. I R. 1963 S. C. 337.

for non-residential purposes, it will not be open to the landlady to claim that before the premises was let out it was residential premises. As far as the landlady and tenant are concerned, it is only the jural relationship between the parties which has to be looked into and not what was the manner in which the premises was being used prior to the letting out.

24. The next point taken is, merely because the requisite permission under section 21 of the Act has not been obtained, would it result in the lease transaction being treated as void and that the tenant cannot seek protection under the Act ? On this aspect, Mr. Sivamani relied upon the decision in *Bapabhai Mohanbhai* v. *Mahila Sahakari Udyog Mandir*[1] which arose under Bombay Rents, Hotel and Lodging House Rates Control Act LVII of 1947, wherein under section 25 (1) of the Act, permission is required for converting a residential premises to a non-residential one and if such an order is not secured, the landlord is liable to be prosecuted and punished under section 25 (2) of the Act. When the landlord sought for recovery of possession, it was held that if relief is to be granted which would be resulting in a violation of section 25 (1) of the Act it would pave the way for prosecution and punishment and no Court can ever grant a relief where contravention has been committed of the Act. It is therefore contended by him that when no permission had been secured for conversion which was a residential premises at the time of coming into force of the Act it would not be open to the tenant to rely upon the terms of the tenancy, and such a lease agreement even if entered into, would not result in the character of the building being changed, and hence the tenant cannot resist by pleading that the landlady cannot ask for her own residential purpose.

25. To counrter this contention, Mr. R. S. Venkatachari, relied upon the decision reported in *Murlidhar Agarwal* v. *State of U. P.* which arose under U. P. (Temporary) Control of Rent and Eviction Act, 1947, where it was held that there was need for securing the permission of the Magistrate before a property is let out, and when there was a contravention, the tenant is protected and the interests acquired by him, would not be taken away because of the contravention committed by the landlord and that the landlord alone will be punished. He also relies upon the decision in *Shankarlal* v. *Jagadiswar Rao*[2], wherein a Full Bench of that Court held that:

> "An agreement of lease entered into between the landlord and tenant in contravention of section 3 (3) of the Hyderabad Rent Control Act or section 3 (5) of the Andhra Pradesh Rent Control Act, will not be illegal and void *inter se* between the parties, either on the ground that it is forbidden by law or on the ground that it is opposed to public policy in terms of section 23 of the Contract Act."

He also refers to the decision reported in *Tikkamchand Mithalal Jain* v. *M. R. Narasimhachari*[3], wherein alone section 21 had been noted even though in *Nagamma* v. *Medula*[4], this section had not been taken note of.

26. For conversion of a building which was residential on the date of the coming into force of the Act, necessary permission has to be secured in writing from the Controller under section 21 of the Act. Without such a written consent if any building had been converted for non-residential purposes, under section 31 of the Act any person who contravenes the provision is liable to be punished with fine which may extend to Rs. 200. In this case, there is no evidence to the effect

1. (1976) 2 S. C. J. 266 : (1975) 2 S. C. C. 492: (1975) R. C. J. 616 : (1976) 1 S. C. R. 411 : A. I. R. 1975 S. C. 2128.

1. (1975) 1 S. C. R. 575: (1974) 2 S. C. C. 472: (1975) 1 S.C.J. 178: A. I. R. 1974 S C. 1924.
2. (1980) 1 An. W.R. 1: (1979) 2 An. P. J. 284 : (1979) 2 An L. T. 293: (1980) R. C. J 618: A.I R 1980 A. P. 181.
3. (1980) 1 M. L. J. 522.
4. (1952) 1 M.L.J. 158: 65 L.W. 1185 : A. I. R. 1954 Mad. 165.

that prior to the tenancy granted in favour of the respondent, the premises was being used as a non-residential premises. It is the land-lady who knowingly had allowed the building to be used for non-residential purposes. Though reliance is placed by Mr. Sivamani on the word 'person' used in section 33 of the Act to include both the landlord and tenant, it does not mean that both of them are to be prosecuted in every case. For contravention of section 21, depending upon the facts and circumstances of each case, it may be either the landlord or the tenant who may be prosecuted, and in some cases both of them also may be prosecuted. If after securing the premises for residential purposes, if the tenant is to convert the premises for non-residential purposes, in such cases, the tenant alone will be punished. If both of them being fully aware that it is a residential premises, later on have it converted as non-residential, by the landlord altering the structure of the building and the tenant using the building as a non-residential premises, then both of them would be prosecuted.

27. The evidence discloses that this is not a case where the tenant took it for residential purpose, and later on converted it. He was put into the premises by the landlady for using it for non-residential purpose. Such being the case, it is only the land-lady who will be liable for prosecution. As held in *Rahim Khan* v. *Khurshed*[1] and *Shankarlal's case*[2], the contravention, if any, would not take away the right of the tenant to claim the benefits under the Act as a tenant. Therefore the tenant has a right to resist the petition by stating that having rented out the building for non-residential purposes, it will not be open to the landlord to ask for residential purposes.

28. The next contention taken by Mr. Sivamani is that even if it is a case of ease for non-residential purposes, now that the circumstances in which the landlady had left Ambattur and took a premises at Madras on rent are over and herself not owning any other property, she is entitled to seek for recovery of possession of the property for residential purposes for which the premises was being originally utilised. Counsel for the petitioner relied upon the decision in *D. B. Godse* v. *Ramachandra Iyer*[1], wherein it was held that it is not for the tenant to dictate as to how the landlady can continue to live in the place where he was living and that there is no necessity to vacate the portion in the occupation of the tenant.

29. This Court has repeatedly held that it is not for the tenant to dictate to the landlord as to what should be the requirement of the landlord, and in this case, it is since reported that out of the 9 children, two are presently studying in High School and the landlady would like to come back and live in her own house. But the only hurdle she faces is that the premises having been let out for non-residential purposes, she cannot disturb such a tenancy till it comes to an end, and the tenant having acquired statutory rights to resist the recovery of possession of the property, unless it be for non-residential purposes. It is only if the landlord requires it for non-residential purposes, she can maintain this petition. In *Thirupathi Nadar, and Sons* v. *Dr. S L. Kantha Rao*[2], a Division Bench of this Court while dealing with the petition where the landlord had asked for additional accommodation, it was held that if it is a residential building, the landlord can obtain additional accommodation only for the purpose of residence, and if it is a non-residential he can obtain additional accommodation only for the purpose of the business which he was carrying on. In this case, though the claim is not for additional accommodation but a petition for eviction on the ground of wilful default, conversion and user for different purposes and for personal occupation, and there being no provision for enabling a landlord to ask for recovery of possession for residential purposes of a premises having let it out for non-residential

1. (1974) 2 S. C. C. 660: (1975) 2 S. C. J. 178: A. I. R. 1975 S. C. 290.
2. (1980) 1 An. W. R. 1 : A.I.R. 1980 A. P. 118

1. A. I. R. 1955 Mysore 107.
2. (1980) T. L. N. J. 145.

purposes, the present petition is not maintainable. By her own conduct, the landlady had allowed a statutory right to be acquired by the tenant for use of the premises for non-residential purposes, though the landlady had violated section 21 of the Act by not securing the written permission of the Controller for such conversion. Hence the right of the tenant to resist this petition filed for recovery of possession for residential purposes, is not taken away Rather the landlady having contravened section 21 of the Act cannot maintain this petition.

30. Even though this petition could have been disposed of by holding that the concurrent findings arrived at, based on relevant evidence, does not call for any interference, in view of the decision in *Rajalakshmi Dyeing Workers' case*[1], the other points had to be considered because of the contentions raised as above adverted to. Now that on all points it had been held against the landlady, this petition is dismissed.
No Costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and S. Swamikkannu, JJ.*

N. Manoharan ... *Appellant**

v.

The State of Tamil Nadu represented by Secretary to Govt. Home Dept, Madras-9 and another ... *Respondents.*

Commission of Enquiry Act (LX of 1952), section 8-B—Commission of Enquiry Tamil Nadu Rules, rules 7 and 10 — Report of the Commission of Enquiry—Findings in the report against the affected party without giving opportunity —That portion, held violation of section 8-B and rules 7 and 10.

Under section 8-B of the Commission of Enquiry Act and the Rules framed thereunder the Commission of Enquiry appointed under the provisions of the said Act was bound to give a reasonable opportunity to the person whose conduct was sought to be inquired into and whose reputation was likely to be prejudicially affected by the enquiry. That portion of the report which dealt with the conduct and reputation of the affected party without giving such party an opportunity of being heard in the inquiry should be taken to be vitiated for violation of section 8-B of the Act and rules 7 and 10 of the Commission of Enquiry Tamil Nadu Rules. [*Para.* 6.]

Those findings cannot exclusively form the subject-matter of any inquiry. No action can therefore be taken against the petitioner solely based on such findings. [*Para.* 7.]

Appeal under Clause 15 of the Letters Patent against the order of V. Ramaswami, J, dated 25th October, 1979 in W. P. No. 4249 of 1979 etc.

P. Chidambaram, for Appellant.

The Government Pleader, for Respondent.

The Order of the Court was made by

Ramanujam, J.—The appellant in the writ appeal and the petitioner in the writ petition who is the same person was a Warder, Grade II in the Central Prison, Madras, during the period from 15th September, 1971, till 10th March, 1978. The State Government by G. O. Ms. No. 202, Public (Law and Order-A), dated 21st May, 1977, appointed a Commission of Enquiry under section 3 of the Commission of Enquiry Act, 1952, to enquire into the incidents of beating and ill-treatment that is alleged to have taken place in the Central Prison, Madras, during February, 1976. The said Commission of Enquiry submitted its report to the first respondent on 26th September, 1977 Paragraphs 4 (56) and 7 (26) of the said report deal with the appellant's conduct as Warder and Commis-

1. (1980) 2 R. C. J. 165 : A.I.R. 1980 S.C. 1253.
*W. A. No. 14 of 1980. *7th August*, 1980.

sion of Enquiry gives the following findings therein as regards the appellant's conduct:

> "Consequently, I have no hesitation in coming to the conclusion that Thiru Manoharan took part in the beating of the detenus on the night of 2nd February, 1976 in the ninth block
>
> Under these circumstances, I am definitely of the opinion that the jail officials had a regular policy of beating every political detenu at the earliest possible opportunity, on their admission and that such beating had been severe and merciless".

Based on the said findings, disciplinary proceedings have been initiated by the first respondent against the appellant and the second respondent has been appointed as the Enquiry Officer The Enquiry Officer has served on the appellant a charge memo. alleging that the appellant has beat detenus and had followed a regular policy of beating political detenus at every available opportunity after their admission and that such beating has always been severe and ruthless causing injuries. This charge was purely based on the findings given by the Commission of Enquiry in paragraphs 4 (26) and 7 (56) of its report. On service of the memo. of charges, the appellant filed two Writ Petitions, W. P. Nos. 4248 of 1979 and 4249 of 1979. W. P. No. 4948 of 1979 was admitted but the W. P. No 4249 of 1979 was dismissed.

2. Since the issues involved in the writ appeal as well as in the writ petition are practically the same, they are dealt with together.

3. W. A. No. 14 of 1980 is directed against the order of V. Ramaswami, J. in W P. No. 4249 of 1979, rejecting the appellant's writ petition for the issue of a writ of *certiorari* to quash paragraphs 4 (56) and 7 (26) of the report, dated 26th September, 1977, of the Commission of Enquiry appointed to enquire into the alleged incidents of harassment and ill-treatment of the detenus alleged to have taken place in the Central Prison, Madras during February, 1976 to February 1977. The said writ petition has been dismissed by the learned Judge on the ground that the report itself has no legal force *proprio vigore*, and therefore, it cannot be the subject-matter of quash proceedings under Article 226 of the Constitution of India and that the nature of the Commission's report being an informative one and the findings thereon not being enforceable by or against any of the parties, it cannot be quashed at the instance of the appellant. Aggrieved against the dismissal of the writ petition the petitioner has come up in appeal.

4. In this appeal, the main contention urged by the learned counsel for the appellant is that even though the report of the Commission of Enquiry, dated 26th September, 1977, has no legal and binding force, so long as it contains a finding that the appellant is guilty of taking part in the beating of the detenus on the night of 2nd February, 1976 in the 9th block of the Central Prison, Madras, the appellant is entitled to question that finding which has been rendered without giving any opportunity to him to put forward his case in defence. According to the learned counsel for the appellant, though the report is not legally enforceable *proprio vigore*, the State of Tamil Nadu, has taken advantage of the said finding contained in that report and has initiated the departmental proceedings only on the basis of the said finding and in those circumstances, the appellant is entitled to seek the quashing of that portion of the report which affects him. The learned counsel also points out that whatever be the nature of the report of the Commission of Enquiry, since it has not complied with the mandatory provision contained in section 6-B of the Commission of Enquiry Act 1952, under which the Commission is under a duty to give a resonable opportunity of being heard in the enquiry, the relevant portion of the report which finds the appellant to be guilty of beating the political prisoner on the night of 2nd

February, 1976, in the Central Prison, Madras without giving an opportunity of being heard has to be set aside.

5. In the counter-affidavit filed on behalf of the respondents they do not dispute the allegation of the appellant that he was not given any opportunity before the Commission rendered its findings in paragraphs 4.56 and 7.26. Even apart from this, the records of the Commission of Enquiry show that no summons was issued to the appellant asking him to put forward his defence with reference to the allegation of his beating the detenus in the Central Jail on 2nd February, 1976. Therefore, the allegation of the petitioner-appellant that the mandatory provision in section 8-B of the Commission of Enquiry Act, as also rules 7 and 10 of the Commission of Enquiry Tamil Nadu Rules, 1972, have not been complied with, appears to be true.

6. Section 8-B of the Commission of Enquiry Act, 1925, is as follows :—

"8-B. If, at any stage of the inquiry, the Commission

(*a*) considers it necessary to inquire into the conduct of any person ; or

(*b*) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry, the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence :

Provided that nothing in this section shall apply where the credit of a witness is being impeached."

Rules 7 and 10 are as follows :—

"7. The manner of holding enquiry and the procedure to be followed :—

1. The Commission shall, as soon as may be after its appointment,

Notice : (*a*) issue a notice to every person, who, in its opinion, should be given an opportunity of being heard in the inquiry, to furnish to the Commission a statement relating to such matters as may be specified in the notice;

(*b*) issue a notification to be published, in such manner as it may deem fit, inviting all persons acquainted, with the subject-matter of the inquiry, to furnish to the Commission a statement relating to such matters as may be specified in such notification.

2. Every statement furnished under sub-rule (1) shall be accompanied by an affidavit in support of the facts set out in the statement sworn or solemnly affirmed by the person furnishing the statement.

3. Every person furnishing a statement under sub-rule (1) shall also furnish to the Commission, along with such statement, wherever possible, the originals or true copies of such of the documents as may be in his possession or power and shall state the name and address of the person with whom the remaining documents are available.........

10. *Persons likely to be prejudicially affected to be heard.*—If, at any stage of the inquiry, the Commission—

(*a*) considers it necessary to inquire into the conduct of any person; or

(*b*) is of the opinion that the reputation of any person is likely to be prejudically affected by the inquiry the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence."

Under the abovesaid section of the Commission of Enquiry Act and the Rules framed thereunder the Commission of Enquiry appointed under the provisions of the said Act is bound to give a reasonable opportunity to the person whose conduct is sought to be inquired into and whose reputation is likely to be prejudicially affected by

the inquiry. Admittedly the report in paragraphs 4 (56) and 7 (26) specifically deals with the conduct of the appellant and the finding given therein has affected the reputation of the appellant. Therefore, that portion of the report which deals with the conduct and reputation of the appellant, without giving the appellant an opportunity of being heard in the inquiry should be taken to be vitiated for violation of section 8-B of the Act. It is true that the report of the Commission of Inquiry has no legal force *proprio vigore*. But, however, it is seen in this case that the findings rendered by the Commission of Inquiry in paragraphs 4 (56) and 7 (26) have been taken as the sole basis for initiating the disciplinary proceedings against the appellant. In those circumstances, the appellant is entitled to put forward his grievance that the Commission of Inquiry has given findings regarding his conduct without giving him an opportunity to put forward his defence and behind his back and, therefore, that portion of the report which deals with his conduct and affects his reputation cannot be relied on by the State Government. Though the appellant had originally prayed for a writ of *certiorari* to quash that portion of the report which affects him, he has subsequently filed a petition, C. M. P. No. 6645 of 1979 for substituting the prayer to *mandamus* forbearing the respondents from taking any action against him based upon paragraphs 4 (56) and 7 (26) of the report which, according to him, are vitiated by the violation of the statutory provision in section 8-B of the Act. Though the learned Judge felt that as the report of the Commission of Inquiry has no legal force *proprio vigore*, there is no scope for quashing such a report, which is only of informative nature, and has no binding force on any of the parties, he has not considered the appellant's request for the issue of an alternative relief by way of *mandamus*. Thus findings rendered in paragraphs 4 (56) and 7 (26) of the report of the Commission of Inquriy are in violation of section 8-B of the Act and rules 7 and 10 of the Commission of Inquiry (Tamil Nadu) Rules in that the appellant was not given an opportunity of being heard at the enquiry, even though the findings rendered deal with his official conduct and affect his reputation. We have to, therefore, hold that no action could be taken purely on the basis of those findings. In this case, the findings have been taken as the sole basis for initiating disciplinary proceedings as against the appellant, and the second respondent in the writ petition has been appointed as the Enquiry Officer for conducting the disciplinary proceedings.

7. In view of the fact that the finding in paragraphs 4 (56) and 7 (26) have been rendered by the Commission behind the back of the appellant, these findings cannot exclusively form the subject-matter of any disciplinary enquiry. In those circumstances, this Court has no other alternative except to issue a writ of *mandamus* forbearing the respondents from taking any action against the appellant solely based on paragraphs 4 (56) and 7 (26) of the report, dated 26th September, 1977 of the Commission of Inquiry.

8. The writ appeal, is, therefore, allowed and a Writ of *mandamus* is issued in W. P. No. 4249 of 1979 as indicated above.

9. In W. P. No. 4248 of 1979, the petitioner seeks the issuance of a writ of *certiorari* to quash the memorandum of charge, dated 29th August, 1978 issued to the petitioner by the Enquiry Officer. That relief has been sought for by the petitioner on the ground that the charge is solely based on the findings rendered by the Commission of Inquiry in paragraphs 4 (56) and 7 (26) of its report. According to the petitioner, since the findings in paragrphs 4 (56) and 7 (26) of the report are vitiated by violation of section 8-B of the Act and rules 7 and 10 of the Rules, those findings cannot form the sole basis for the disciplinary enquiry. A perusal of the said memorandum of charge clearly indicates that there is no other basis for the charge except the findings in paragraphs 4 (56) and 7 (26). We have already held in the above writ appeal, the findings rendered in the said paragraphs cannot

be relied on by the respondents for taking any action against the petitioner. Therefore, we have to naturally quash the memorandum of charge. This is however without prejudice to the right of the respondents to initiate fresh proceedings, if the charge levelled against the appellant could be established by other materials independent of the findings rendered in paragraphs 4 (56) and 7 (26) of the report.

10. In this view, the writ petition is also allowed. There will be no order as to costs either in the writ appeal or in the writ petition.

S. J. —— *Appeal allowed; Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, CJ. and S. Nainar Sundaram, J.*

C. Alagirisamy Naidu ... *Appellant**

v.

The Collector of Madurai District, Madurai and another .. *Respondents.*

Tamil Nadu Panchayats Act (XXXV of 1958), section 60 (2)—Higher grade teacher in Panchayat Union—Transfer of, from one Panchayat Union to another Panchayat Union —Unions to be consulted before making transfer—Consultation not so made—Transfer invalid.

The first proviso to sub-section (2) of section 60 of the Tamil Nadu Panchayats Act clearly contemplated the concerned two Panchayat Union Councils being consulted before the transfer is effected Simply because the power of the Government under section 60 (2) had been delegated to the Collector, the requirement of the first proviso could not be dispensed with. There being no power other than the one conferred by section 60 (2), the requirement of consultation must be complied with whether the Government exercised the power themselves or some other officer by virtue of the delegation by the Government exercised thatpower. [*Para.* 2.]

Appeal under clause 15 of the Letters Patent against the order of Mohan, J., dated 19th July, 1976, in W. P. No. 2730 of 1976.

S. N. Abdul Wahab and *M. M. Md. Sadakdullah,* for Appellant.

The Government Pleader and *Shakir Ali* and *P. Chandrasekharan,* for Respondents.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the order of Mohan, J., dated 19th July, 1976, dismissing W. P. No. 2730 of 1976, filed by the appellant herein. The appellant was a Higher Grade teacher working in K Vellakulam Panchayat Union, and by the order, dated 24th June, 1976, passed by the Collector of Madurai, the appellant was transferred to Aladipatti in Kodaikanal Panchayat Union. It was this order that was challenged in the writ petition filed by the appellant herein. The order was challenged on two grounds. One was that under section 60 (2) of the Tamil Nadu Panchayats Act, 1958, it was the Government that had the power to transfer and that the Collector had no such power. The second was that, in any event, before the order of transfer was made, the concerned Panchayat Unions should have been consulted and that in this case there was no such consultation. The learned Judge gave notice to the Government Pleader, who represented to the Court that the power of the Government under section 60 (2) of the Act had been delegated to the Collector and that it was that delegated power that was exercised by the Collector.

2. As far as the requirement of consultation was concerned, reliance was placed on behalf of the appellant before us on the decision of Palaniswami, J , in *Baktavastalam* v. *Dist , Collector, Tiruchirapalli*[1]. The learned

*W.A. No. 239 of 1976. *6th August,* 1980.

1. W.P. No. 4124 of 1970, dated 13th October, 1972.

Judge in the present case did not follow that judgment, because he was of the opinion that a particular aspect was not placed before the learned Judge. The particular aspect to which the learned Judge made reference was Cl (16) of G. O. Ms. No. 2015, Rural Development and Local Administration Department, dated 23rd September, 1972, providing "The Collector may transfer teachers from one Panchayat Union to another *suo motu* within the district". That Government Order merely laid down certain guidelines for the transfer of teachers working in Panchayat Union schools. It is admitted before us that the Collector has no power independent of the delegation by the Government under section 60 (2) of the Act to transfer any officer or servant of a Panchayat Union Council from one Union to another. Section 60 (2) of the Act which is the only statutory provision dealing with transfer, reads as follows: —

> "60 (2). Notwithstanding anything contained in this Act or the Tamil Nadu District Municipalities Act, 1920, any officer or servant of a Panchayat Union Council (including the Commissioner), may be transferred by the Government to service of any other Panchayat Union Council or any municipality constituted under the Tamil Nadu District Municipalities Act, 1920 :
>
> Provided that no officer or servant (other than the Commissioner) shall be so transferred except after consulting the Panchayat Union Councils or municipal Councils concerned.
>
> Any authority making a transfer under this sub-section may issue such general or special directions as may in its opinion be necessary for the purpose of giving due effect to such transfer".

Thus the first proviso to sub-section (2) of section 60 clearly contemplates the two Panchayat Union Councils being consulted before the transfer is effected. Simply because the power of the Government under section 60 (2) has been delegated to the Collector, the requirement of the first proviso cannot be dispensed with. There being no power other than the one conferred by section 60 (2), the requirement of consultation must be complied with, whether the Government exercised the power themselves, or some other officer by virtue of the delegation (*sic*) by the Government of the exercise of the power.

3. Under these circumstances, it was the judgment of Palaniswami, J., which governed the situation. Consequently, we allow the writ appeal, set aside the order of the learned Judge and allow the writ petition filed by the appellant herein. There will be no order as to costs.

S. J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, J.*

Jaithun Beevi and others ... *Petitioners**

v.

Begum Dustagir ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). section 2 (8)—Non-residential building—Death of tenant—Conditions requisite to clothe his legal representatives with the right as a statutory tenant.

To clothe the legal representatives of a deceased tenant with the right as a statutory tenant, they must be, in the case of a non-residential building, continuously associated with the original statutory tenant for the purpose of carrying on the business of the original tenant upto the death of the tenant and should have continued to carry on such

*C R. P. No. 2894 of 1978.

25th October, 1980.

business thereafter. Unless a finding is given one way or the other, the authorities under the Act (XVIII of 1960) cannot proceed further to pass orders under any one of the sections mentioned in the Act.

[*Para.* 4.]

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 to revise the order of the Sub-Court, Madurai in C. M. A No. 237 of 1978 R. C. O. P. No 96 of 1978, District Munsif Court, Madurai Taluk.

K. Venkataswami and *K. Govindarajan*, for Petitioners.

Arab Shah, for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is filed by the respondents in R. C. O. P. No. 96 of 1978 on the file of the Rent Controller (District Munsif, Madurai taluk) against the order passed in C. M. A. No. 237 of 1978 on the file of the Subordinate Judge of Madurai. The respondent herein, who is the petitioner in the Rent Control Original Petition filed an eviction petition alleging that one S. M. S Mohideen Batcha came as a tenant in respect of door Nos. 8 and 9, Jarikaikara Street, Ward No. 12, near police lines, Madurai town, on a monthly rent of Rs. 35, that the said rent was subsequently raised to Rs. 50 per month from January, 1970 onwards, that subsequently S. M. S. Mohideen Batcha agreed to pay rent at the rate of Rs. 60 per month, that there were arrears in the payment of rent by S. M. S. Mohideen Batcha beginning from 1st May, 1974, onwards that Mohideen Batcha died four months prior to the filing of the eviction petition, leaving behind him the petitioners 1 to 3 herein as legal heirs to the estate of the said S. M. S. Mohideen Batcha and that the petitioners 1 to 3 are liable to pay the rent to respondent herein. It has been further alleged that there are arrears to the tune of Rs. 1,980 which cover 33 months and that in spite of notice, the petitioners herein have not paid the same. It is further stated that the petitioners never even replied to the notice Exhibit A-3, sent by the respondent herein. The petitioners herein, in their counter, have *inter alia* stated that S. M. S. Mohideen Batcha was regular in paying the rent till his lifetime, that no notice of demand was issued by the respondent herein when S. M. S. Mohideen Batcha was alive, that S. M S Mohideen Batcha and his younger brother S. M. S. Nawabjan were doing business in the suit premises, that after the death of Mohideen Batcha during 1976, his brother Nawabjan is running the businesss in his own name by paying rent to the suit property to the respondent herein and that the petitioners herein did not choose to reply to the notice sent to them since they have no interest in the suit property after the demise of Mohideen Batcha. It has been also specifically averred in the counter statement that the petition is barred for non-joinder of proper parties, that this eviction petition has been filed fraudulently against the petitioners herein, even though the respondent herein is receiving rent from the said S. M. S. Nawabjan, who is actually running the business in the suit property. The Courts below, after finding that there are arrears of rent, ordered eviction. Aggrieved by the order of eviction, the petitioners have preferred the above revision petition.

2. Mr. Govindarajan, learned counsel appearing for the petitioners, has stated that originally Mohideen Batcha and his brother Nawabjan were carrying on the business, that subsequent to the death of Mohideen Batcha, Nawabjan is continuing the business that the petitioners have no connection either to the premises or to the business that is being run there, that the petitioners have absolutely no interest in the business or in the tenancy and that they are not the tenants, as defined under section 2 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

3. Mr. Arab Shah, learned counsel appearing for the respondent, submitted that the very fact that the petitioners have not

replied to Exhibit A-3 shows that they are running the business and are liable to pay the rents, that the case set up by the petitioners as if they are not the tenants is just to wriggle out of the liability to pay the rents and that, as a matter of fact, they are in possession and are running the business.

4. There is a specific averment in the counter-statement filed by the petitioners herein that the petitioners have no interest in the suit property, after the demise of Mohideen Batcha. No doubt, the respondent herein has let in evidence to show that the petitioners are running the business and they are the tenants under the respondent. Unfortunately, there is no finding by the Courts below as to whether the petitioners are the tenants under the respondent herein. The petition itself is maintainable only if the petitioners are construed to be the tenants under the respondent herein. In this context, the definition of 'tenant' under section 2 (8) may be looked into. Section 2 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 reads as follows:

> " 'Tenant' means any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representative of a deceased tenant who:
>
> (*i*) in the case of a residential building, had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant, and
>
> (*ii*) in the case of a non-residential building, had been in continuous association with the tenant for the purpose of carrying on the business of the tenant up to the death of the tenant and continues to carry on such business thereafter, and
>
> (*iii*) a person continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart-stand or slaughter house or all rents for shops has been farmed out or leased by a Municipal Council or a Panchayat Union Council or the Municipal Corporation of Madras or the Municipal Corporation of Madurai".

It is clear from the facts of the case that the building in question is a non-residential building. If that be so, to clothe the legal representatives with the right as a statutory tenant, they must be, in the case of a non-residential building, continuously associated with the original statutory tenant for the purpose of carrying on the business of the original tenant upto the death of the tenant and should have continued to carry on such business thereafter. Unless a finding is given one way or the other, in my opinion, the authorities constituted under the Act cannot proceed further to pass orders under any one of the sections mentioned in the Act. This finding is lacking in the orders passed by the two Courts below. Hence, the orders passed by the Courts below are set aside and the case is remanded to the file of the Rent Controller for the purpose of the same afresh bearing in mind the observations I have made above. There will be no order as to casts.

S. J. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and S. Swamikkannnu, JJ.*

K. R. Sivagami, Proprietor, Rajendran Tourist .... *Appellant**

v.

Mahaboob Nisa Bi and others .... *Respondents*

Motor Accident— Tort —Motor Vehicles Act (IV of 1939), section 95 (2)—Motor Accident—Tourist taxi — Permit to carry five passengers — Driver allowing seven passengers to travel — Accident resulting in death to three persons — Claim for compens tion filed against the owner and the Insurance Company — Owner

* A. A. O Nos. 247 and 367 of 1977 and Memo. of Objections. 16*th July*, 1980.

and Insurer contending that the driver carried two more passengers than what was permitted and therefore the driver was negligent — Held owner was liable vicariously for the tort committed by the driver — Held also that insurer's liability was limited to Rs. 10,000 for each individual passenger.

A tourist taxi carrying seven passengers met with an accident by dashing against a stationary lorry. The accident resulted in the death of 3 persons and injuries to 4 persons. One A. R. died in the accident and his widow and two minor sons preferred claim petitions for compensation. The owner and the insurer who were respondents contended that the taxi was authorised to carry only five passengers, but the driver unauthorisedly carried two more passengers. According to them the accident was due to the negligence of the driver. The Tribunal held that the accident was due to rash and negligent driving of the taxi driver and also held that the owner was vicariously liable. The Insurer was held liable to meet the claim. The Tribunal quantified the compensation at Rs. 50,000. Against the award of the Tribunal, the owner and insurer filed appeals and the claimants filed cross objections.

Held: The non-observance of the Rules relating to the number of passengers to be carried can only be said to be an improper performance of the driver's duties Even assuming that the permit condition not to take more than the permitted number of passengers is taken as a prohibition or restriction, that relates only to the manner of performance of the driver's duties in the course of his employment and that cannot in any way limit the sphere of his employment. Admittedly the employment of the driver is to transport passengers in the tourist taxi, collect the fare from them and make it over to the owner of the taxi. [*Para.* 12.]

The carriage of two excess passengers by the driver of the taxi will only amount to an improper performance of his duties as a driver of a taxi and therefore, it cannot be taken to be outside the sphere of his employment. The owner of the taxi is vicariously liable for the tort committed by the driver of his taxi [*Para.* 13.

In view of the specific provisions contained in section 95 (2) of the Motor Vehicles Act, the liability of the insurer can be limited only to Rs. 10,000 for each individual passenger. [*Para.* 17.]

Cases referred to :—

Mohideensab Gaffarsab Kundgol v. *Rohidas Hari Kindalka*, (1973) A. C J. 424; *Twine* v. *Beans Express L T. D.*, (1946) 1 All E R. 202; *Sitaram Motilal Kalal* v. *Santanprasad Jaishankar Bhatt*, (1966) A. C. J. 89: (1966) 3 S. C. R. 527 : A. I. R. 1966 S. C. 1697; *Machiraju Visalakshi* v. *Treasurer, Council of India, Mission of Lutheran Church in America*. (1978) 2 An. W. R. 51: (1978) A.C J. 314: A I R. 1978 A. P 310; *Rajagopalan* v. *Mohanan* (1979) 2 M. L. J. 460; *Canadian Pacific Rly. Co.* v. *Leonard Lockhart*, A. I R. 1943 P. C. 63; *Kesavan Nair* v. *State Insurance Officer*, (1971) A. C. J. 219; *Amthaben* v. *Supdt. Geophyscist, O. N. G. C.*, (1976) A.C.J. 219.

Appeal against the award of the Claims Tribunal, (Sub-Judge) of Cuddalore in C. P. No. 109 of 1974.

K. C. Srinivasan and *K. S. Narasimhan*, for Appellant.

N. Srivatsamani, Kurian, Arumugham and *Joseph*, for Respondents.

The Order of the Court was made by

Ramanujam, J.—As these two appeals arise out of the same award passed by the Motor Accidents Claims Tribunal, Cuddalore in the same claim petition arising out of an accident they are dealt with together.

2. On 6th May, 1974, at about 4-30 A. M. an Ambassador tourist taxi, bearing registration No. M. S. L. 8304 belonging to the appellant in C. M. A. No. 247 of 1977 and insured with the appellant in C. M. A. No. 367 of 1977, dashed against a stationary lorry near Ulundurpet railway gate. The said accident resulted in the death of three persons and injury to four persons who travelled in the taxi. On the basis that the accident

was due to the rash and negligent driving of the taxi by its driver, the claim petitions had been filed by the dependants of the deceased as also the insured before the Motor Accidents Claims Tribunal.

3. One of the persons who died in the accident, is one Abdul Rahman. His widow and two minor sons had claimed a sum of Rs. 1,00,000, as compensation in C.P.No. 109 of 1974. We are not now concerned with the claim put forward by the dependants of the other deceased and insured. We are concerned in these appeals only with reference to the claim made by the dependants of the said Abdul Rahman.

4. The claim was resisted by the owner of the taxi as well as the insurer with whom the taxi has been insured. They were respondents 1 and 2 in the claim petition. Their case was that the taxi was authorised to carry only five passengers, but, the driver unauthorisedly carried two more passengers, and that as the taxi which was authorised to carry only five passengers carried seven passengers, the accident can be taken to be due to the negligence of the driver. They also contended that the amount claimed as compensation was exorbitant. In the face of the above rival contentions, the Tribunal framed the following two points for consideration:

1. Whether the accident was due to the rash and negligent driving of the vehicle M. S. L. 8304?

2. Whether the claimants are entitled to get compensation and if so to what amount?

The Tribunal after considering the evidence adduced by the parties in this case and also the parties in the other claim petitions, held that the accident was due to the rash and negligent driving of the taxi driver, and that there is a vicarious liability on the part of the owner of the taxi and also the insurer to meet the claim put forward by the claimants.

5. On the question of compensation the Tribunal held that the deceased was earning an average income of Rs. 350 per month and adopting 28 years purchase as the basis, fixed the compensation at Rs. 1,20,960. But, taking into account that the lump sum payment was to be made, it quantified the compensation at Rs. 50,000. As against the said award, the owner of the taxi has filed C. M. A. No. 247 of 1977 and the insurer has filed C. M. A. No. 367 of 1977. The claimants not satisfied with the award of compensation of Rs. 50, 000 have filed cross-objections in both the above appeals.

6. Learned counsel for the appellants in C. M. A. No. 247 of 1977, contends that on the facts of this case, it could clearly be seen that the driver of the tourist taxi has acted outside his authority in taking two more passengers than the permitted capacity and as the accident had occurred while he was carrying an unauthorised load of seven passengers as against the permitted load of five passengers, the owner of the taxi who had not authorised the taxi driver to take in more passengers than the permitted capacity, cannot be held liable

7. Learned counsel for the appellants in C. M. A. No. 367 of 1977, contends that whatever be the liability of the owner of the taxi, the liability of the insurer is limited to Rs. 10,000, in respect of the accident and with reference to each passenger, the liability is limited to Rs. 10,000, and that in this case, the Tribunal had erred in awarding a sum of Rs. 37,000, to the claimants in C. P. No. 109 of 1974, in utter disregard of the provisions in section 95 (2) (*b*) (*ii*) (4). In cross-objections filed in both the appeals, the claimants have sought for higher compensation than the compensation of Rs. 50,000 awarded by the Tribunal.

8. In these appeals, the finding of the Tribunal that the accident was due to the rash and negligent driving by the taxi driver, has not been questioned. Therefore, we have to proceed on the basis that the accident had occurred only due to the rash and negligent

driving of the driver of the taxi. Thus, the three questions that arise for consideration in these appeals are—

1. Whether the owner of the taxi is vicariously liable for the accident that has been caused by the driver of the taxi by his rash and negligent driving?

2. What is the extent of liability of the insurer in the event of the owner of the taxi being vicariously held liable for the accident?

3. Whether the compensation awarded by the Tribunal is fair and reasonable?

According to the learned counsel for the owner of the taxi, as the driver of the taxi in this case has acted beyond his authority in taking more passengers than the permitted capacity, the owner is not vicariously liable. Learned counsel would say that apart from the fact that the owner of the taxi did not permit the driver to take more passengers than the permitted limit, according to the permit the taxi cannot carry more than five passengers and therefore, the driver by taking unauthorisedly two more passengers than the permitted capacity, has not only acted without the requisite authority, of the owner of the taxi, but also against the specific prohibition contained in the permit issued for the taxi. Learned counsel drew our attention to the following decisions and submitted that the principle laid down in those decisions squarely applied to the facts of this case.

9. *Mohideensab Gaffarsab Kundgol* v. *Rohidas Hari Kindalka*[1], is a decision of the Division Bench of the Mysore High Court, wherein the Bench held that where the driver of a goods vehicle picked up a passenger and the passenger sustained injuries on account of accident to the vehicle, the owner of the vehicle cannot be held vicariously liable to pay compensation, because giving a lift to a person in a goods vehicle by the driver is outside the scope of his employment. In that case, reference has been made to the decision in *Twine* v. *Beans Express L. J. D.*[1], where Uthwatt, J, has observed while dealing with almost a similar set of facts as follows:

"It was outside the scope of the driver's employment for him to bring within the class of persons to whom a duty to take care was owed by the employer, a man to whom, contrary to his instructions, he gave a lift .. ..

In *Sitaram Motilal Kala* v. *Santanprasad Jaishankar Bhatt*[2], the Supreme Court while dealing with the owner of a car who entrusted it to another for plying it as a taxi and the latter had given it to the cleaner for taking a driving test and the vehicle knocking down in an accident resulting in injuries to a third party, held that the owner of the vehicle was not vicariously liable for the tort committed by the cleaner who was driving the vehicle at the time of the accident. The reasoning of the Supreme Court is as follows—It is settled law that a master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act was done in the course of employment, the servant's act would not make the employer liable. The act must be either a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some Act authorised by the master. The scope of employment of a servant need not be viewed narrowly, but the essential element that the wrong must be committed by the servant during the course of employment, i. e., in doing the master's business, ought always to be present. It is not essential that the act of the servant should be for the master's benefit. The Supreme Court dealing with the question of master's vicarious liability observed as follows—

"A master is vicariously liable for the acts of his servant acting in the course of the employment. For the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful act (*sic*) in an unauthorised mode of doing

1. (1973) A. C. J. 424.

1. (1946) 1 All E. R. 202.
2. (1966) A.C.J. 89: (1966) 3 S.C. R. 527: A.I.R. 1966 S. C. 1697.

some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if be commits an accident. But it is equally well-settled that if the servant at the time of the accident is not acting within the course of his employment but is doing something for himself. the master is not liable. There is a presumption that a vehicle is driven on the master's business and by his authorised agent or servant but the presumption can be met''.

The Supreme Court held on the facts of the case before them that the owner was not liable for the tort committed by the cleaner who drove the vehicle.

10. In *Machiraju Visalakshi* v. *Treasurer, Council of India, Mission of Lutheran Church in America, Guntur and others*[1], the driver of a car picked up passengers while the car was being driven for master's business. The driver was not authorised by the master to pick up passengers *en route*. The car after picking up the passengers dashed against a tree resulting in the death of passengers picked up unauthorisedly by the driver. The question arose as to whether the owner of the car was vicariously liable for the tort committed by the driver. The Bench of the Andhra Pradesh High Court held that the act of the driver in picking up passengers is not within the scope of the employment and therefore, the owner of the vehicle cannot be held vicariously liable. In this case, the learned Judges had applied the principle laid down in *Sitaram* v. *Santhanuprasad*[2], and held that unless it is proved that the owner of the vehicle had authorised the driver to carry passengers *en route* while going on master's business, the master is not liable for the tort committed by the driver with reference to the passengers carried unauthorisedly.

11. In *Rajagopalan* v. *Mohanan*[3], a Division Bench of this Court to which one of us was a party had dealt with a case of a vehicle —tempo—which was intended to carry only goods and not any passenger. It got involved

1. (1978) A. C. J. 314: (1978) 2 An. W. R. 51: A. I. R. 1978 A. P. 310.
2. (1966) A.C.J. 89: (1966) 3 S.C.R. 527.
3. (1979) 2 M. L. J. 460.

in an accident which resulted in injury to a passenger who was carried in the vehicle unauthorisedly by the driver. The question arose as to whether the owner of the vehicle is vicariously liable for the injuries sustained by the passenger. It was held that the owner of the vehicle is not vicariously liable for the tort committed by the driver in the absence of materials to indicate that the deceased was travelling in the tempo in the course of his employment

12. Out of four decisions referred to above, the decisions in *Mohideensab Gafarsab Kundgel* v. *Rohidas Kindalkar*[1] and *Rajagopalan* v. *Mohanan*[2], deal with different sets of facts. In those cases, the vehicle was intended to carry goods and not passengers and therefore, any unauthorised carriage of passengers by the driver contrary to the instructions of the owner of the vehicle and also contrary to the permit conditions was taken to be outside the scope of the driver's employment. There, the employment of the driver by the owner of the vehicle was only for the purpose of carrrying goods from one place to another and the contract of employment did not include the transport of passengers from one place to another. In these circumstances, it has been held in those two decisions that the driver of the vehicle had acted beyond the scope of his employment and therefore, no vicarious liability can be fastened on the owner of the vehicle. The case before the Supreme Court in *Sitaram Motilal Kalal* v. *Santanuprasad Jaisankar Bhatt*[3] was in respect of a vehicle which had been entrusted to another for the purpose of running it as a taxi, and that another allowing the cleaner to drive the vehicle. Admittedly, the cleaner who drove the vehicle was not employed by the owner of the vehicle to drive the same. So the tort committed by him while driving the vehicle has been taken not to arise in the course of his employment. Only the decision in the Division Bench of the Andhra Pradesh High Court in *Machiraju Visalakshi* v. *Treasurer, Council of India, Mission of Lutheran Church in America, Guntur*[4], is very near to the case on

1. 1973 A. C. J. 424.
2. (1979) 2 M. L. J. 460.
3. (1966) A. C. J. 89: (1966) 3 S. C. R. 527.
4. 1978 A. C. J. 314: (1978) 2 An. W. R. 51.

hand. But even there, the car which was involved in the accident, was a private car and the driver of the car while going on his master's business picked up passengers without the authority of the master and therefore, it was for that reason, the Court held that the unauthorised picking up of passengers by the driver without due authority from his master was taken to be an act not within the scope of his employment. However, the facts in this case are slightly different. The vehicle involved is a tourist taxi and it was intended to carry passengers. Therefore, no specific authority is required to carry passengers on the vehicle from the owner of the vehicle. It is true, in this case, the driver of the vehicle has carried more than the permitted load of passengers and this is contrary to the conditions of the permit under which the vehicle was allowed to be used as a tourist taxi. The non-observance of the rules relating to the number of passengers to be carried can only be said to be an improper performance of the driver's duties. Even assuming that the permit condition not to take more than the permitted number of passengers is taken as a prohibition or restriction, that relates only to the manner of performance of the driver's duties in the course of his employment and that cannot in any way limit the sphere of his employment. Admittedly, the employment of the driver is to transport passengers in the tourist taxi, collect the fare from them and make it over to the owner of the taxi.

13. As pointed out in *Canadian Pacific Rly. Co.* v. *Leonard Lockhart*[1], there is a clear cut distinction between a restriction or a limitation which pertains to the sphere of employment and those which relate to the manner of performance of his duties within the sphere of his employment. A restriction relating to the number of passengers to be carried can only be taken to be a restriction relating to the manner of performance of the driver's duties and it does not relate to the sphere of the employment. In this view of the matter, we are inclined to take the view that the carriage of two excess passengers by the driver of the taxi will only amount to an improper performance of his duties as a driver of a taxi and that therefore, it cannot be taken to be outside the sphere of his employment. We have to hold therefore, that the owner of the taxi is vicariously liable for the tort committed by the driver of his taxi. We also find that a similar view has been taken by the Kerala High Court in *Kesavan Nair* v. *State Insurance Officer*[1] and the Gujarat High Court in *Amthiben* v. *Supdt. Geophysicist, O. N. G. C.*[2].

14. Coming to the award of compensation the quantum of which has been challenged by the owner of the taxi, it is seen that the Tribunal has taken the monthly income of the deceased at Rs. 360 based on the income-tax assessment year 1974-75. Since the deceased was aged 27 at the time of the accident, the Tribunal assumed that he would have lived for another 28 years and earned the same amount of income. The Tribunal has not allowed any deduction for personal expenses and it has not also determined separately the dependency of the family on the income of the deceased. Having determined the compensation under the head of pecuniary loss for a period of 28 years, at Rs. 1,20,960 the Tribunal, however, restricted the compensation to Rs. 50,000 taking into account the award of compensation in a lump sum.

15. The contention of the learned counsel for the owner of the taxi is that the quantum has been fixed quite arbitrarily by the Tribunal. It is submitted that the Tribunal was not justified in taking Rs. 360 to be the monthly income of the deceased based on the assessment order, that the tribunal has ignored the fact that the income received by the deceased is by virtue of his position as a partner in a family partnership and that it cannot be taken to be the exclusive basis for determining the income of the deceased. It is also pointed out that the other partners have also been assessed for the same amount of income which will show that the income

1. A.I.R. 1943 P. C. 63.

1. 1971 A. C. J. 219.
2. 1976 A. C. J. 219.

has not been earned by the deceased as a result of his personal exertion, But, a perusal of the evidence of P. W. 5 shows that the partnership business was conducted only by the deceased and not by the other partner. If really there was an exertion on the part of the deceased and that brought income to the partnership business, the personal services of the deceased should be quantified in terms of money.

16. We are inclined to agree with the learned counsel for the appellant that the income earned by the deceased as a partner of the firm cannot be taken to be an exclusive basis for determining the pecuniary loss sufferred by the family as a result of his death as the share of partnership assets continues with the family even after his death. However, taking into account the status of the deceased and his family and his capacity and ability to do business, it can be taken that the deceased would have, out of his earnings either as a partner of the family concern or otherwise, contributed to the family at least a sum of Rs. 150. Taking the monthly dependency of the family at Rs. 150, and taking the longevity of the deceased at 55, the pecuniary loss would have come to Rs. 48,600. In this case, though the lower Court has not awarded any compensation for loss of expectation of life, we are inclined to grant a sum of Rs. 5,000 under that head for the reason that the deceased died at an young age of 27 years leaving behind his wife and children. Therefore, the total sum comes to Rs. 53,600. But, we have not taken into account the uncertainties of life, which is a relevant factor to be taken into account and the benefit of lump sum payment instead of the benefit which they will receive monthly if the deceased had been alive. Therefore, towards the uncertainties of life and also for the benefit of lump sum, we deduct a sum of Rs. 8,600. Thus, the proper and reasonable compensation in this case comes to Rs. 45,000. We therefore, fix the compensation payable to the claimants at Rs. 45,000 as against the compensation awarded by the lower Court.

17. Coming to the stand taken by the Insurance company in C. M. A. No. 367 of 1977, it is seen that section 95 (2) (*b*) (*ii*) (4) of the Motor Vehicles Act, specifically provides two limitations in relation to the liability of the insurer in respect of an accident in which a vehicle carrying passengers is involved. Section 95 (2) says, a policy of insurance shall cover any liability incurred in respect of any one accident upto certain limits. One limitation is contained in clause (*b*) (*ii*) (1) which says that the insurer is liable to pay Rs. 50,000, in all where the vehicle is registered to carry not more than 30 passengers. The second limitation is contained in clause (*b*) (*ii*) (4) and that limitation is that subject to the limit of Rs. 50,000 for one accident compensation cannot exceed Rs. 10,000 per passenger if the vehicle is a motor car and Rs. 5,000 in respect of any other vehicle. In this case, the vehicle involved in the accident is a motor cab which is defined in section 2 (15) of the Motor Vehicles Act as any motor vehicle constructed, adopted or used to carry not more than six passengers excluding the driver for hire or reward. The tourist taxi which was involved in the accident in this case, will definitely come under the said definition of 'motor cab'. Therefore, in view of the specific provisions contained in section 95 (2) of the Motor Vehicles Act, the liability of the insurer can be limited only to Rs. 10,000 for each individual passenger. In this case, the tribunal has awarded a sum of Rs. 37,000, as against the insurer. This is contrary to the specific provision contained in section 95 (2) (*b*) (*ii*) (4) of the Motor Vehicles Act. We have to therefore, set aside that portion of the award which directed the insurance company to pay a sum of Rs. 37,000 to the claimants and instead direct the insurer to pay a sum of Rs. 10,000 to the claimants in this case will be in accord with the statutory provisions in section 95 (2) of the Motor Vehicles Act.

18. Both the appeals are, therefore, partly allowed to the extent indicated above, and the cross-objections in both these appeals are dismissed. There will be no order as to costs in both the appeals.

S. J. —— *Appeals partly allowed. Cross objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Ellapuram Panchayat Union, Periapalayam, represented by its Commissioner .... *Petitioner**

v.

Sri Bhavaniamman Devastanam, represented by its Managing Trustee, P. S. Sethurathinammal .... *Respondent.*

Civil Procedure Code (V of 1908), Order 41 rules 14, 17 and 21—Notice—Appeal pending—Transfer from one Sub-Court to another—Notice to be sent to parties by transferee Court—No provision for notice either in Code of Civil Procedure or Civil Rules of Practice and circular orders.

It would be a very salutary practice if even in cases of appeals transferred from one Sub-Court to another owing to exigencies of workload, a notice to that effect should be given to the parties informing them that the appeal which was pending before one Court had since been transferred to another Court. Since a party to a litigation before any Court should know where it is pending and when it is likely to be taken up, it is essential that the parties must be informed by the transferee Court in order to enable them to appear before the transferee Court and contest the proceedings so transferred by engaging other counsel and taking necessary steps in that regard. In the absence of any provision to that effect either under the Code of Civil Procedure or under the Civil Rules of Practice and circular orders, every effort should be made by Courts to put like litigants on notice of the transfer of pending litigation, be it in the trial Court or the appellate Court as the case may be. It is very necessary and desirable and may even be imperative that till such time as provision in this regard is made either under the Code of Civil Procedure or under the Civil Rules of Practice and circular orders that there should be an inflexible adherence to this requirement regarding notice; as otherwise, Courts cannot adjudicate upon the rival claims of the litigants before it after giving an effective and adequate hearing to both sides, which is the bedrock of our system of administration of justice. [*Para.* 7.]

Held, that in the present case the petitioner cannot be held to have been misled on account of non-receipt of notice for hearing of the appeal from the transferee Court and the delay in filing the application to rehear the appeal had not been satisfactorily explained at all.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Chengalpattu dated 3rd September, 1980 and made in I. A. No. 140 of 1980 in A. S. No. 188 of 1977.

N. R. Chandran, Additional Government Pleader II, for Petitioner.

R. D. Indrasenan, for Respondent.

The Court made the following

ORDER.—The defendant in O. S No. 413 of 1972, District Munsif's Court, Tiruvellore, is the petitioner in this civil revision petition. That suit was instituted by the respondent herein for a declaration that a passage leading to the Devasthanam in Periyapalayam belongs to it and also for an injunction. That suit was resisted by the petitioner herein on several grounds which need not be noticed in detail for purposes of the present civil revision petition. Suffice it to say that the learned District Munsif, Tiruvellore, on consideration of the oral as well as documentary evidence, dismissed the suit instituted by the respondent on 30th July, 1973. Aggrieved by that, the respondent preferred an appeal in A. S. No. 178 of 1973 to the Sub-Court, Kancheepuram. In order to contest the appeal, the petitioner

*C. R. P. No. 19 of 1981. *24th February,* 1981.

had engaged one Thiru C. M. Palanirajakumar as counsel. The appeal A. S. No. 178 of 1973 filed by the respondent herein before the Sub-Court, Kancheepuram, was later transferred to the file of the II Additional Subordinate Judge, Chengalpattu, as per order dated 6th December, 1977 in accordance with the proceedings of the District Judge. The appeal so transferred from Sub-Court, Kancheepuram, to the Sub-Court, Chengalpattu, was received by Sub-Court, Chengalpattu, on 15th December, 1977 and renumbered as A. S. No. 188 of 1977 on its file and posted for hearing on 16th January, 1978. From 16th January, 1978, it was adjourned to 15th February, 1978 and on that day, Thiru D. K. Sampath, Advocate, Chengalpattu, filed vakalat in the appeal on behalf of the respondent, and the appeal was adjourned to 27th February, 1978. On 27th February, 1978, the petitioner was stated to be absent and the appeal was directed to be posted in the list for hearing on 17th April, 1978. From 17th April, 1978 the hearing of the appeal was adjourned to 18th April, 1978. and on 18th April, 1978, the appeal was further adjourned to 24th April, 1978. On 24th April, 1978, the notes paper indicates, "both not ready" and the appeal was thereafter adjourned to 12th July, 1978. From 12th July, 1978 the appeal was adjourned to 15th July, 1978, 20th July, 1978, 25th July, 1978, 27th July, 1978 and thereafter to 29th July, 1978. On 29th July, 1978, arguments were heard and judgment was reserved and on 4th August, 1978, the learned Subordinate Judge, Chengalpattu, on a consideration of the merits, allowed the appeal setting aside the dismissal of the suit instituted by the respondent herein and decreeing it as prayed for. On 25th July, 1980, the petitioner filed I. A. No, 140 of 1980 in A. S. No. 188 of 1977, II Additional Sub-Court, Chengalpattu, to condone a delay of 690 days in filing an application to rehear the appeal. In the affidavit in support of that application. the petitioner referred to the filing of the appeal in A. S. No. 178 of 1973, Sub-Court, Kancheepuram, by the respondent and the engaging of a counsel by the petitioner. The petitioner further stated that the counsel so engaged by the petitioner informed the petitioner in 1977 that the appeal had been transferred to Sub-Court. Chengalpattu. Even thereafter, the petitioner claimed that the petitioner was under the impression that a notice for the hearing of the appeal will be sent by Sub-Court. Chengalpattu, but that it did not receive any such notice and that the petitioner became aware of the result of the appeal only on 28th June, 1980. The petitioner thus claimed that the petition for restoration of the appeal had been filed within thirty days of the date of knowledge of the result of the appeal and prayed that the *ex-parte* disposal of the appeal should be set aside and that the appeal should also be reheard on its merits.

2. That application was resisted by the respondent herein on the ground that even according to the petitioner, the petitioner was aware of the transfer of the appeal from Sub-Court, Kancheepuram, to Sub-Court, Chengalpattu, and that in spite of it, the petitioner did not take any steps whatever for defending the appeal. It was also pointed out that the petitioner had been informed about the result of the appeal by the respondent by communications addressed to the petitioner by the Managing Trustees of the respondent. A further objection was also raised before Sub-Court, Chengalpattu, that Thiru Varada Reddy, Advocate. offered to appear on behalf of the petitioner on 15th February, 1978. The respondent also contended that the disposal of the appeal was on the merits and not *ex parte* and that the petitioner has not satisfactorily explained everyday's delay.

3. The learned II Additional Subordinate Judge, Chengalpattu, who enquired into this application held that the petitioner has not satisfactorily explained the delay and that the disposal of the appeal was also on the merits, and, therefore. no ground was made out to restore and rehear the appeal, disposed of earlier on 4th August, 1978. It is the correctness of this order that is challenged in this civil revision petition.

4. What is urged by the learned counsel for the petitioner on the strength of Order 41, rule 17 (2), Code of Civil Procedure, is that the disposal of the appeal A. S. No. 188 of

1977 by the Sub Court, Chengalpattu, is an *ex parte* disposal and that that appeal should be restored and reheard in the exercise of the powers under Order 41, rule 21, Code of Civil Procedure. The learned counsel for the petitioner further submits that the petitioner was *bona fide* under the impression that a fresh notice of the day fixed for the hearing of the appeal will be sent by Sub Court, Chengalpattu, to which Court the appeal stood transferred and since no such notice was received, effective steps were not taken by the petitioner for the conduct of the appeal and therefore, this would be a case of non-service of notice, which would be sufficient cause for the non-appearance of the petitioner at the time when the appeal in A. S. No. 188 of 1977 was disposed of. The further contention of the learned counsel for the petitioner that the application to set aside the *ex parte* disposal of the appeal had been filed immediately after the petitioner became aware of the result of the appeal on 28th June, 1980 and, therefore, the delay has been satisfactorily explained.

5. On the other hand, the learned counsel for the respondent points out that even according to the petitioner, the fact of the transfer of the appeal from Sub-Court, Kancheepuram, to the Sub-Court, Chengalpattu, was within the knowledge of the petitioner even in 1977 and in spite of it, no steps were taken by the petitioner before the transferee Court, and, therefore, the petitioner cannot now turn round and say that for want of notice from Sub-Court, Chengalpattu, it did not know about the pendency of the appeal before that Court and could not therefore, take necessary steps therein. It is the further submission of the learned counsel for the respondent that a perusal of the notes paper, particularly, the entry dated 24th April, 1978 would indicate that the petitioner had also entered appearance through counsel, as otherwise, the entry "Both not ready" would not have been made therein, and this, according to the learned counsel for the respondent, supports its case that the petitioner was represented by counsel or at any rate, counsel offered to appear though eventually he did not and, therefore, the petitioner was fully aware of the pendency of the appeal, but did not take any steps.

6. It is not now in dispute that notice of the appeal in A. S. No. 178 of 1973, Sub-Court, Kancheepuram, was given to the petitioner and that a counsel of the name of Thiru C. M. Palanirajakumar was also engaged by the petitioner to defend the appeal. In paragraph 1 of the affidavit filed in support of the application I. A. No. 140 of 1980 in A.S. No. 188 of 1977, the petitioner has clearly admitted that Thiru Palanirajakumar, the counsel engaged by the petitioner, had informed the petitioner in 1977 that the appeal had been transferred to Sub-Court, Chengalpattu. From this it is obvious that the petitioner had knowledge of the transfer of the appeal A. S. No. 178 of 1973, Sub-Court, Kancheepuram, to the Sub-Court, Chengalpattu, and therefore, one would have normally expected the petitioner to have taken further steps with reference to the appeal so transferred before Sub-Court, Chengalpattu. The omission, according to the petitioner, to take such steps was on account of an impression stated to have been entertained by the petitioner that another fresh summons or notice will be sent by Sub-Court, Chengalpattu, to the petitioner and that since such a notice was not sent, the petitioner, was unaware of the appeal and it had been disposed of on 4th August, 1978 without the knowledge of the petitioner as regards the hearing of the appeal which later came to be known by the petitioner only on 28th June, 1980. Under Order 41, rule 14, Code of Civil Procedure, provision is made for service of notice on the respondent or on his pleader in the same manner provided for the service of summons on a defendant. Order 41, rule 14 (2), Code of Civil Procedure, enables the appellate Court to effect service in the appeal by itself. Order 41, rule 15, Code of Civil Procedure, states that the notice to the respondent in the appeal should declare that if he does not appear on the day fixed, the appeal will be heard *ex parte*. Order 41, rule 17 (1), Code of Civil Procedure, provides for the dismissal of the appeal when the appellant fails to appear on the day fixed for the hearing. Order 41, rule 17 (2), Code of Civil Procedure, declares that even

when the appeal is disposed of in the absence of the respondent, but in the presence of the appellant, such hearing of the appeal and disposal is only *ex-parte*. Under Order 41, rule 21, Code of Civil Procedure, if the disposal of an appeal is *ex-parte* and a judgement is pronounced against the respondent, an application may be made by such respondent to rehear the appeal and if the Court is satisfied that notice was not duly served or that the respondent was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit.

In the present case, the question is, whether the petitioner has established that notice of the appeal was not duly served on him. Normally, a party to a proceeding before any Civil Court is entitled to a notice from that Court where the proceedings are pending in order to fix him with the knowledge of the pendency of the proceedings and also to enable him to take steps in that regard. It is on account of this that even in matters which are tried afresh as a result of remit orders that the parties are given notice afresh, as otherwise the fact that the Court is again seized of the matter may not be within the knowledge of the parties. Likewise, even when an appeal is preferred, the respondent to such an appeal is entitled to a notice and this has been provided for under Order 41, rule 14, Code of Civil Procedure.

7. It would be a very salutary practice if even in cases of appeals transferred from one Sub-Court to another owing to exigencies of workload, a notice to that effect should be given to the parties informing them that the appeal which was pending before one Court has since been transferred to another Court. No provision to this effect either under the Code of Civil Procedure or under the Civil Rules of Practice and Circular Orders has been brought to the notice of the Court by the counsel on either side. Since a party to a litigation before any Court should know where it is pending and when it is likely to be taken up, it is essential that parties must be informed by the transferee Court in order to enable them to appear before the tranferee Court and contest the proceedings so transferred by engaging other counsel and taking necessary steps in that regard. In the absence of any provision to that effect either under the Code of Civil Procedure or under the Civil Rules of Practice and Circular Orders, every effort should be made by Courts to put the litigants on notice of the transfer of pending litigation, be it the trial Court or the appellate Court as the case may be. It is necessary and desirable, may even imperative, that till such time as provision in this regard is made either under the Code of Civil Procedure or under the Civil Rules of Practice and Circular Orders there should be an inflexible adherence to this requirement regarding notice; as otherwise, Courts cannot adjudicate upon the rival claims of the litigants before it after giving an effective and adequate hearing to both sides, which is the bedrock of our system of administration of justice.

8. However, in the instant case, even according to the petitioner, notice had been received by the petitioner in A. S. No. 178 of 1973, Sub-Court, Kancheepuram, and a counsel has also been engaged who had also discharged his duty by communicating the transfer of the appeal from Sub-Court, Kancheepuram, to Sub-Court, Chengalpattu. It cannot, therefore, be said that the petitioner did not have any knowledge of the pendency of the appeal before Sub-Court, Chengalpattu, and that it had been misled on account of the absence of a notice to that effect from Sub Court, Chengalpattu. The petitioner undoubtedly had knowledge of the transfer of the appeal from Sub Court, Kancheepuram; to Sub Court, Chengalpattu; even thereafter the petitioner did not take any serious steps to defend the appeal. Under these circumstances, the explanation attempted by the petitioner that it was expecting a notice from Sub Court, Chengalpattu, and that since it

did not receive any such notice, it was unaware of the pendency of the appeal before that Court cannot be accepted. No doubt, the disposal of the appeal, in the absence of the petitioner herein, would nevertheless be an *exparte* disposal under Order 41, rule 17 (2), Code of Civil Procedure. But even so, the petitioner has not satisfied the Court that notice was not duly served or that it was prevented by sufficient cause from appearing when the appeal was called on for hearing. In the present case, as has been already pointed out, the notice of the pendency of the appeal in A. S. No. No. 178 of 1973, Sub-Court, Kancheepuram, was duly served on the petitioner and the petitioner was aware also of the transfer of that appeal to Sub Court, Chengalpattu, and therefore, it cannot be said that the petitioner did not have the notice of the pendency of the appeal before Sub Court, Chengalpattu.

9. The other question that remains for consideration is, whether the petitioner was prevented by sufficient cause from appearing when the appeal was called. As regards this, the petitioner has not attempted to do anything other than what has been referred to already. No reason has been given as to why the petitioner who was aware of the pendency of the appeal before the Sub-Court, Chengalpattu, even in 1977 did not take any steps to defend the same. The non-receipt of the notice which has been stated as the only ground has already been adverted to and held to be not an acceptable ground to restore the appeal. It is also not established as to how the petitioner suddenly came to know of the result of the appeal only on 28th June, 1980; when the petitioner was aware of the appeal before Sub Court, Chengalpattu, even in 1977 itself, it is obvious that the petitioner, though fully aware of the pendency of the appeal before Sub Court, Chengalpattu, did not take any steps whatever in that reagard for some reason or other and has now come forward with this application on the ground that the petitioner was expecting a notice from Sub-Court, Chengalpattu and that it became aware of the result of the appeal only on 28th June, 1980. As pointed out, earlier, the petitioner cannot take any shelter under the plea that it had been misled on account of the non-receipt of notice for the hearing of the appeal from the transferee Court. Under the circumstances of the present case, the delay in the filing of the application to rehear the appeal has not been satisfactorily explained at all. The Court below was, therefore, perfectly justified in dismissing the application filed by the petitioner and that order does not suffer from any illegality or irregularity. The civil revision petition, therefore, fails and is dismissed. No costs.

S. J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *P. R. Gokulakrishnan, O C. J.*,

M/s. K. P. Lonappan and Sons, ... *Petitioner**

v.

S. Mohamed Iqbal .... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (b)—Petition for eviction— Demolition and reconstruction —Eviction ordered by Rent Controller and Appellate Authority — Revision by tenant —All relevant factors considered by lower Courts — No scope for interference.

The landlord filed the petition for eviction on the ground of the premises being requried for demolition and reconstruction. Both the Rent Controller and the Appellate Authority agreed with the landlord and ordered evic-

*C. R. P. No. 447 of 1981.

20th February, 1981.

tion. On revision to the High Court by the tenant.

Held, In this case, there was a clear finding by the courts below that the building was an old one and from the evidence it was clear that it had cracks on the floor and on the walls and the wooden frames were partially eaten away and had become hollow in certain places. The Courts below had also assessed the age of the building as 50 to 55 years. The fact that this building got partially damaged due to a fire accident in the adjacent building was also taken into consideration by the Courts below. On these facts, there was a definite finding that the building was an old one and it required demolition and reconstruction. The authorities below had applied their mind regarding the existing condition of the building and had correctly come to the conclusion that the building requires demolition and reconstruction. As regards the resources of the landlord to construct the building and the preparation he had made for the construction, the High Court found that the Courts below had cogently discussed the evidence on record and had come to the conclusion that the landlord had proved all these factors. The High Court did not find any illegality, impropriety or irregularity in the orders passed by the courts below, and as such, the civil revision petition was dismissed. [*Para.* 3.]

Case referred to :—

Metalware and Company v. *Bansilal*, (1979) 2 S. C. J 377: (1980) 1 M. L. J. (S. C) 1: 1979 3 S. C. C. 398: A. I. R. 1979 S. C. 1559.

Petition under section 25 of the Tamil Nadu Buildings Lease and Rent Control Act XVIII of 1960 as amended Act XXIII of 1973 praying the High Court to revise the Order of the Court of the Small Causes (Chief Judge) Madras dated 14th August, 1980, and made in H. R. A. No. 487 of 1979 H. R. C No. 1308 of 1975, Small Causes (VI Judge), Madras.

Habibullah Badsha, for Petitioner.

The Court delivered the following

JUDGMENT:—The tenant is the petitioner herein. The petition for eviction was filed on the ground that the landlord requires the building for demolition and reconstruction since it is a very old one and its first floor had only a tiled roof. It was averred in the petition that the building is situate in an important commercial centre and on the surroundings, new buildings have been constructed. Both the Courts below have gone into the *bona fides* of the requirement of the landlord and allowed the petition. Aggrieved by the orders of the courts below, the tenant has preferred the above Civil Revision Petition.

2. Mr. Habibullah Badsha, learned counsel for the petitioner-tenant submitted that the courts below have not properly considered the *bona fides* of the landlord in requiring the building for demolition and reconstruction, that the petition itself lacks particulars regarding the reason for demolition and reconstruction and that in any event the petition has to be dismissed since the landlord has not gone into the witness box to substantiate his *bona fides* in claiming the building for demolition and reconstruction. The Appellate Authority has taken into consideration the age of the building, the resources of the landlord to put up a new construction and the preparation made by the landlord in that regard. As regards the age and condition of the building, the landlord has let in two witnesses to speak about the same. They are P Ws. 1 and 2. P. W. 1 is no one other than the brother of the landlord, while P. W. 2 is a building contractor. P. W. No. 1 has stated that the building is at least hundred years old, that there are cracks in the building, that the building is vibrating due to the heavy traffic in that area, that the walls of the building are made up of brick and lime and that the first floor is roofed with tiles. P. W. 2 who is a building contractor has stated that the building is in a bad condition with cracks on the floor and on the walls, that the wooden frames are partially eaten away and have become hollow in

certain places and that the building requires demolition and reconstruction. The learned Appellate Authority has also noticed from the evidence of D. Ws. 1 and 2 that the very next building was recently pulled down and a multi-storeyed building has been constructed in that place, that there was a big fire accident in the adjacent building and that this present building got damaged partially due to the said fire accident. Taking into consideration all these aspects of the case, the learned Appellate Authority has held that it is necessary to pull down the building and reconstruct the same and that the landlord has proved that the building in question is old enough and it requires demolition and reconstruction.

3. Mr. Habibullah Badsha brings to my notice the decision of the Supreme Court in *Metalware & Company* v. *Bansilal*[1]. In that case arising out of a petition for eviction on the ground of demolition and reconstruction, the Supreme Court observed that apart from the factor of the landlord being possessed of sufficient means or funds to undertake the project, the Court must have regard to the existing condition of the building, its age and situation and the possibility or otherwise of its being put to more profitable use after reconstruction. The Supreme Court has observed as follows:

> "All these factors being relevant must enter the verdict of the Rent Controller on the question of the *bona fide* requirement of the landlord under section 14 (1) (*b*) .. ..
>
> It is thefore clear to us that the age and condition of the building would certainly be a relevant factor which will have to be taken into account while pronouncing upon the *bona fide* requirement of the landlord under section 14 (1) (*b*) of the Act and the same cannot be ignored".

In paragraph 11 of its Judgment, the Supreme Court has further observed as follows:

> "Having regard to the above discussion, on the construction of section 14 (1) (*b*) of the Act, particularly in the light of its scheme, we are clearly of the view that the existing condition of the building for from being totally irrelevant is a vital factor which will have to be considered while pronouncing upon the *bona fide* requirement of the landlord under that provision which has to be done by having regard to 'all the circumstances' and since in the instant case all the courts have totally ignored this vital factor, we feel that their conclusion on the question of *bona fide* requirement of the landlord deserves to be set aside."

I do not think that the facts of that case will apply to the present case. In this case, there is a clear finding by the courts below that the building is an old one and from the evidence it is clear that it had cracks on the floor and on the walls and the wooden frames are partially eaten away and have become hollow in certain places The Courts below have also assessed the age of the building as 50 to 55 years. The fact that this building got partially damaged due to the fire accident in the adjacent building was also taken into consideration by the courts below. On these facts, there is a definite finding that the building is an old one and it requires demolition and reconstruction. I am therefore of the opinion that the authorities below have applied their mind regarding the existing condition of the building and have correctly come to the conclusion that the building requires demolition and reconstruction. As regards the resources of the landlord to construct the building and the preparation he has made for the construction, I find that the courts below have cogently discussed the evidence on record and have come to the conclusion that the landlord has proved all these factors. The eviction petition in this case was filed as early as in 197? and the petitioner herein has successfully prevented the landlord from taking possession of the building for the purpose of demolition and reconstruction even as late as in 1981. I do not find any illegality, impropriety or irregularity in the orders passed by the courts

1. (1979) 3 S.C.C. 398: (1980) 1 M. L. J. (S.C.) 1: (1979) 2 S.C.J. 177: A.I.R. 1979 S. C. 1559.

below, and as such, the civil revision petition is dismissed.

4. Mr. Habibullah Badsha, learned counsel for the petitioner, submits that the petitioner, is having its business at the premises in question for nearly twenty years, that it is situated in a busy locality at Broadway and that if the petitioner is thrown out of the building, immense loss and hardship would be caused to the petitioner. He submits that some time may be given to the petitioner for vacating the premises. The request seems to be a genuine one on the facts and circumstances of this case. The petitioner is therefore given ten week's time from today to hand over vacant possession of the premises to the respondent herein.

S. J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ratnam, J.*

R. Sundaresan and two others .... *Petitioners**

A. Ramachandran and Company by Partner Ramachandran and two others ... *Respondents.*

(A) *Tamil Nadu Debt Relief Act (XL of 1979), section 25 — Applicability —* Ex parte *decree passed in a suit — Application to set aside the decree under the provisions of the Act — Application dismissed — Civil Miscellaneous Appeal to the High Court, if maintainable.*

(B) *Civil Procedure Code (V of 1908) as amended by Act (CIV of 1976), sections 2 (2) and 47 — Decree — Meaning of.*

*C. M. A. SR. No. 17735 of 1981. *30th March,* 1981.

Stemming from a statute a right of appeal is a substantive right and any provision conferring such a right should be interpreted with a liberality which would favour an appeal being entertained rather than a stringency that would defeat it. The words of section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) are clear and in favour of an appeal. There is no ambiguity. The use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure", clearly indicates that as a result of a fiction the effect of an adjudication under the provisions of the Act is placed on a par with that of a decree which, otherwise it is not. [*Para.* 2.]

The use of the words " as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure" in section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) clearly indicates that though the effect of the order passed under the Act is not that of a decree and even if the effect of an adjudication under section 47, of the Code is taken outside the scope of the definition of a decree under section 2 (2) such an adjudication shall nevertheless be treated as a decree, though in fact and also in law it is not. It must also be noticed that the application in the present case has been filed in the suit itself and if the order on such application satisfies the characteristics of a decree, the mere fact that the order is deemed to be one passed under section 47, Code of Civil Procedure, which as a result of the amendment is taken out of the category of decrees as defined in section 2 (2) Code of Civil Procedure, would not be of any consequence. [*Para.* 3.]

Cases referred to:

East and Dwellings Company Ltd. v. *Finsbury Borough Council,* (1952) A. C. 109; *Industrial Supplies (P.) Ltd* v *Union of India,* A. I. R. 1980 S. C. 1858.

S. Jagadisan, for Petitioner.

The Court made the following

ORDER.—The question of the maintainability of an appeal under section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) arises for consideration in this matter under the following circumstances. The appellants filed I A No 1239 of 1979 in O S. No. 119 of 1971, Principal Sub-Court, Salem, under sections 14 (2) and 16 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979), praying for setting aside the *ex parte* decree dated 14th June, 1971, as null and void and also for an amendment of the decree. The application was dismissed by the learned Principal Subordinate Judge, Salem, by his order dated 24th December, 1980. Against that order, the appellants preferred a Civil Miscellaneous Appeal under section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) The office returned the papers raising a question as to how the Civil Miscellaneous Appeal is maintainable and requiring the counsel for the appellants to furnish any authority in support of the maintainability of the appeal. The papers were thereafter re-presented stating that the appeal would lie as per section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979). The office nevertheless entertained doubt whether in view of the amendment of section 2 (2), Code of Civil Procedure, by Act CIV of 1976, the adjudication on an application under section 14 (2) and 6 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) would still be deemed to be a decree within the meaning of section 47, Code of Civil Procedure and appealable as such under section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979). Section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) so far as it is relevant purpose, reads as follows :

> "An appeal shall lie from any of the following orders passed by a Court under this Act, as if such order related to the execution. discharge or satisfaction of a decree within the meaning of section 7 of the Code of Civil Procedure, 1908 (Central Act V of 1908)."

Under section 25 (1) (*a*) to (*g*) orders passed under certain provisions of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) have been made appealable. The order in the present case would fall under section 25 (1) (*b*). Section 25 (2) provides for a second appeal on the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908 and that section reads as under :

> "From any order passed on an appeal presented to it under the provisions of sub-section (1) by a Court subordinate to the High Court an appeal shall lie to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908 (Central Act V of 1908)."

That under section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979), the legislature thought fit to confer a right of appeal in matters falling under section 25 (1) (*a*) to (*g*) is very clear. The question is, whether as a result of the amendment of section 2 (2), Code of Civil Procedure, deleting from the scope of the definition of a decree an adjudication under section 47, Code of Civil Procedure, the right of appeal is in any manner curtailed. The argument raised against the maintainability of the appeal is that only by reference to section 47, Code of Civil Procedure, the effect of an adjudication under the Act is equated to that of a decree and when an adjudication under section 47. Code of Civil Procedure cannot itself be a decree within the meaning of section 2 (2), Code of Civil Procedure, as a result of the amendment introduced by Act CIV of 1976 the appeal would be incompetent. Though the provisions of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) were passed and also published after the amendments to the Code of Civil Procedure were effected by Act CIV of 1976, yet the legislature thought fit to confer the right of appeal under section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) as if the adjudication under certain provisions of the Act amounted to a decree within the meaning of section 47, Code of Civil Procedure. It cannot be assumed that the legislature was unaware of the amendments made to the Code of Civil Procedure by Act CIV of 1976. But yet, the

right of appeal under section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) has been conferred against a class of adjudications, as if the adjudication related to the execution, discharge or satisfaction of a decree within the meaning of section 47, Code of Civil Procedure.

2. Stemming from a statute, a right of appeal is a substantive right and any provision conferring such a right should be interpreted with a liberality which would favour an appeal being entertained rather than a stringency that would defeat it. The words of section 25 of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) are clear and in favour of an appeal and there is no ambiguity. The use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure clearly indicates that as a result of a fiction the effect of an adjudication under the provisions of the Act is placed on a par with that of a decree which, otherwise it is not. In Corpus Juris, Volume 25, page 1036 fiction is defined as under :

> "A legal assumption that a taking is true which is either not true or which is probably false as true; as assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place, an allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for every purpose, except to defeat the beneficial and for which the fiction is invented and allowed."

3. It is also pertinent to recall in this connection the oft quoted passage of Lord Asquith in *East and Dwellings Company Ltd.* v. *Finsbury Borough Council*[1], which brings out very clearly the legal effect of a legal fiction:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. . . . The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corrolaries of that state of affairs."

The above passage has been referred to with approval by the Supreme Court in several earlier cases and also in *Industrial supplies (P) Ltd.* v. *Union of India*[1]. At page 1864, it has been pointed out that when a legal fiction is incorporated in a statute, the Court has to ascertain for what purpose the fiction is created and after ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried out also to its logical conclusion and in order to do so, the court has to assume all the facts and consequences which are incidental or inevitable corrollaries. The use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure" in section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 (XL of 1979) clearly indicates that though the effect of the order passed under the Act is not that of a decree and even if the effect of an adjudication under section 47, Code of Civil Procedure is taken outside the scope of the definition of a decree under section 2 (2), Code of Civil Procedure such an adjudication shall nevertheless be treated as a decree, though in fact and also in law it is not. It must also be noticed that the application in the present case has been filed in the suit itself and if the order on such an application satisfies the characteristics of a decree, the mere fact that the order is deemed to be one passed under section 47, Code of Civil Procedure, which, as a result of the amendment is taken out of the

1. (1952) A. C. 109.

1. A. I. R. 1980 S. C. 1858.

category of decrees as defined in section 2 (2), Code of Civil Procedure, would not be of any consequence. In view of the aforesaid considerations, the doubt entertained by the office is, thoroughly unfounded and is unsupportable as well The office is, therefore, directed to entertain the appeal and number the same, if the papers are otherwise in order.

R. S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

Aviyur Mariamman Temple by Hereditary Trustee Parasuraman ... *Appellant**

v.

T. N. Sundaramoorthi Pillai and another. ... *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 63 (b)—Rival claimants to the office of trusteeship before Deputy Commissioner—Deputy Commissioner has no jurisdiction to decide as between rival claimants to a hereditary trusteeship.

Section 63 of the Tamil Nadu Hindu Religious and Charitable Endowments Act enables a Deputy Commissioner to enquire into and decide as to "whether a trustee holds or held office as a hereditary trustee". It is by now well-settled that the jurisdiction of the Deputy Commissioner under section 57 (*b*) of the Hindu Religious and Charitable Endowments Act of 1951 corresponding to section 63 (*c*) of Tamil Nadu Act XXII of 1959, is confined to a decision whether a a trustee holds or held office as a hereditary trustee *i. e.*, that decision should be in relation to the status of the office of the trusteeship, namely whether it is hereditary or not and that it is not competent for the Deputy Commissioner to go into the further question as to who among the competing claimants is a hereditary trustee as the matter is not covered by the above provision. This is clear from the decisions in *Krishnaswami Raja* v. *Krishna Raja*, (1968) 1 M L J. 11 and *Rengayya Gounder* v. *Kannappa Naicker* (1971) 1 M. L. J. 358. In view of the above decisions, he question as to who as between the rival claimants is the hereditary trustee cannot be decided by the Deputy Commissioner under section 63 (*b*) of Tamil Nadu Act XXII of 1959, as, if such a decision is rendered by him, the same cannot bind the Civil Court which has to decide independently on the evidence adduced by the parties. [*Para.* 3.]

*A. A. O. No. 447 of 1978. 28*th November*, 1980.

Cases referred to:—

Krishnaswami Raja v. *Krishna Raja*, (1968) 1 M. L. J. 119; *Rengayya Gounder* v. *Kannappa Naicker*, (1971) 1 M. L. J. 358.

Appeal against the Judgment and decree of the Court of the Subordinate Judge, Cuddalore dated 24th August, 1978 and made in A. S. No. 194 of 1977 (O. S. No. 68 of 1976) District Munsif Court Tirukoilur.

R. Gandhi, M. Kamalanathan and *G. Sivabalanathan*, for Appellant.

R. Alwyar and *W. C. Thiruvengadam*, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is directed against the judgment and decree of the lower appellate Court in A. S No. 194 of 1977 remitting the suit O. S. No. 68 of 1976 on the file of the District Munsif, Tirukoilur to decide the question as to who as between the parties to the suit is a hereditary trustee for the suit temple.

2. The circumstances under which the suit came to be filed may briefly be stated: There is a temple called Aviyur Mariamman temple in Aviyur Village, Tirukovilur Taluk, South Arcot District. There is no dispute that the said temple is a public temple. The appellant herein filed an application before the Deputy Commissioner of Hindu Religious and Charitable Endowments under section 63 (*b*) of the Tamil Nadu Act XXII of 1959 for a declaration that the office of trusteeship in the suit temple is hereditary and that he is the hereditary trustee of the temple. The Deputy Commissioner granted the declaration prayed for by the appellant and the order of the Deputy Commissioner has been marked as Exhibit A-4 in the case, Exhibit A-5 being the certified copy of the annexure to the order. Thereafter there was an appeal against the said order of the Deputy Commissioner, but the said appeal was dismissed by the Commissioner, Hindu Religious and Charitable Endowments. Later the appellant herein filed O. S. No. 68 of 1976 on the file of the District Munsif, Tirukovilur, for a declaration that he is the hereditary trustee of the suit temple and for a permanent injunction restraining the respondents from interfering with the appellant's functioning as a trustee of the suit temple. The appellant contended that the order passed by the Deputy Commissioner declaring him to be a hereditary trustee has become final and conclusive and that decision not having be n challenged under section 70 of Tamil Nadu Act XXII of 1959, the present suit seeking a declaration that the appellant is a trustee is maintainable. This contention was upheld and based on the order passed by the Deputy Commissioner, the trial Court held that the appellant is a hereditary trustee of the suit temple and therefore the plaintiff is entitled to the declaration. The trial Court thus decreed the appellant's suit. The respondents herein filed an appeal before the lower appellate Court contending that the Deputy Commissioner acting under section 63 (*b*) of Tamil Nadu Act XXII of 195 can only decide whether a trusteeship in a temple is hereditary or not and he has no jurisdiction to decide as to who among the rival claimants is the hereditary trustee and therefore the decision rendered by the Deputy Commissioner under Exhibit A-4 that the plaintiff is a hereditary trustee of the suit temple is without jurisdiction and therefore the Sub-Court has to decide the question as to who is the hereditary trustee without reference to the order of the Deputy Commissioner. The lower appellate Court held that the trial Court was in error in proceeding on the basis that the question as to whether the plaintiff was a hereditary trustee or not is a question which is exclusively within the jurisdiction of the Deputy Commissioner to decide under section 63 (*b*) and as such the defendants cannot question the said decision without adopting the course laid down in section 70 of the Act, that the said decision rendered by the Deputy Commissioner is binding on the civil Court and that in fact the dispute between two rival claimants to succeed to a hereditary office is not within the scope of section 63 of the Act and therefore the decision rendered by the Deputy Commissioner in Exhibit A-4 cannot be taken to be final and conclusive and therefore the trial Court has to go into the question as to whether who as between the parties is to be declared as hereditary trustee of the suit temple. In this view, the lower Appellate Court has set aside the judgment and decree of the trial Court and remitted the matter to the trial Court for disposal. The said remit order has been challenged in this appeal on the ground that the lower appellate Court has not properly understood the scope of section 63 (*b*) of Tamil Nadu Act XXII of 1959.

3. Section 63 of the Act enables the Deputy Commissioner to enquire into and decide as to "whether a trustee holds or held office as a hereditary trustee." According to the learned counsel for the appellant that provision will enable the Deputy Commissioner to decide whether the plaintiff in the suit held office as a hereditary trustee and there-

fore the decision of the Deputy Commissioner that the plaintiff was a hereditary trustee of the suit temple cannot be said to be outside his jurisdiction, and the contrary view taken by the lower appellate Court cannot legally be sustained. However, it is by now well-settled that the jurisdiction of the Deputy Commissioner under section 57 (*b*) of the Hindu Religious and Charitable Endoments Act of 1951 corresponding to section 63 (*b*) of Tamil Nadu Acl XXII of 1959 is confined to a decision whether a trustee holds or held office as a hereditary trustee, *i. e.*, that decision should be in relation to the status of the office of trusteeship, namely whether it is hereditary or not and that it is not competent for the Deputy Commissioner to go into the further question as to who among the competing claimants is a hereditary trustee as such a matter is not covered by the above provision This is clear from the decisions in *Krishnasami Raja* v *Krishna Raja*[1] and *Rengayya Goundar* v. *Karuppa Naicker*[2]. In view of the above decisions with which I am in entire agreement, the question as to who as between the rival claiments is a hereditary trustee cannot be decided by the Deputy Commissioner under section 63 (*b*) of Tamil Nadu Act XXII of 1959 and if such a decision had been referred by him under Exhibit A-4 the same cannot bind the civil Court and the civil Court has to decide that question independently on the evidence adduced by the parties. It is for this resson, the lower appellate Court has remanded the matter to the trial Court. I am of the view that the remand order is quite warranted on the facts of this case and no interference is called for. The Civil Miscellaneous appeal is therefore dismissed with costs.

R. S. —— *Appeal dismissed.*

1. (1968) 1 M. L. J. 1?.
2. (1971) 1 M. L. J. 358.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

T. N. Krishnamoorthy ... *Petitioner**

v.

M/s. Jagat Textiles, represented by its partner Lalji Bhujpunia, No. 16 Manjanakara Street and No. 51, Mahal 6th Steet, Madural Town ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 25 — Revision — Procedure to be followed by High Court — No procedure prescribed under Act (XVIII of 1960) — Code of Civil Procedure to be followed — Review competent being specifically provided in Civil Procedure Code.

When the High Court has been conferred with powers to entertain a revision under section 25 of the Tamil Nadu Act XVIII of 1960 as held in *Thirupathi Nadar* v. *Kandaswami Nadar*, (1968) 81 L. W 642, when a Court is invested with powers to adopt the procedure applicable to it, there is necessity for invoking the Code of Civil Procedure. No procedure having been contemplated in the Rules to be adopted by the High Court and when the High Court is a Court of record the necessary implication is, the Court will have to decide the revision petitions by following the Civil Procedure Code. [*Para.* 27.]

The power of revision conferred under section 25 of the Act XVIII of 1960 is on the High Court and while entertaining the revision it exercises the power of a Court created under the Constitution. It is not a '*persona designata*'. When power is conferred on a Court, and no other special procedure is prescribed for disposal of matters under a particular statute, as held in *P. N. Thakershi* v. *Pradyumansinghji* A. I. R. 1970 S. C 1273, by such conferment

*R. C M P. No. 2822 of 1980 in C. R P. 2612 of 19 9. 31*st October*, 1980.

of power, there is necessary implication that the Code of Civil Procedure, would apply and in turn the power of review would be available to the High Court. [*Para.* 32.]

Cases referred to: —

Ramachandracharyulu v. *Rangacharyalu*, (1926) 51 M. L. J. 418: A. I. R. 1926. Mad. 1117; *R Venkatesachary* v. *The Judg , Court of Small Causes*, (1949) 2 M L. J. 784: A.I.R. 1950 Mad. 366; *P. Govindaswami Naicker* v. *S. R. Kerwar*, (1969) 2 M. L. J. 452; *S. M. Gopalakrishna Chetty* v. *Ganeshan*, (1976) 1 S. C. J. 358: (1976) 1 S. C. R. 273: A. I R. 1975 S. C. 1750; *T. N. Unnamalai Achi* v. *Saminatha Pathar*, (1980) 93 L. W. 404; *S. J. S. Fernandas* v. *V. Ranganayakalu Chetty*, (1952) 2 M L J. 445: 65 L. W. 1101: A. I. R. 1953 Mad. 236; *P. N. Thakershi* v. *Pradyumansinghji*, A. I R. 1970 S. C. 1273; *Seethalakshmi Ammal* v. *Rajammal*, (1965) 1 M. L. J 287; *Syed Hanifa* v. *Muhammad Khalifulla*, (1969) 1 M. L. J. 413: (1969) M. L J. (Crl.) 358: 81 L. W 592: A I. R. 1970 Mad. 39; *Abdul Wahid Sahib* v. *Dewanjee Abdul Khader Sahib*, (1947) 1 M. L. J. 207: I L. R. (1948) Mad. 43: 60 L. W 199: A I.R 1947 Mad. 400; *Rayala Corporation Madras* v. *Syed Bawker & Co., Madras*, (1957) 1 M.L.J. 241: I. L. R (1957) Mad. 856: 70 L W. 345: A. I. R. 1957 Mad. 385; *Rajam Ayyar* v. *Pavanambal*, (1949) 1 M L. J. 419: 62 L. W. 245: A.I.R 1949 Mad. 787; *Devichand Moolchand* v. *Dhanraj Kantilal*, (1948) 1 M. L. J. 276: 61 L. W. 267: A. I. R. 1949 Mad. 53; *T K. Chennakesavalu* v. *Mansukhlal*, (1946) 1 M. L. J. 300; *K. R. Sankar* v. *Buvanambabalammal*, (1971) 1 M. L. J. 230: 84 L. W. 134: A. I. R. 1971 Mad. 368; *Usman Koya* v. *Muthukrishnan*, (1977) T. L. N. J. 273; *Thirupathi Nadar* v. *Kandasami Nadar*, (1968) 81 L. W. 40; *Telephone Company* v. *Postmaster General*, (1913) A C. 546; *Adaikkappa Chetti* v. *Chandrasekhara Thevar*, (1948) 1 M. L. J. 41: L. R 74 I. A. 264: 61 L. W. 52: A. I. R. 1948 P. C. 12.

Application under section 114 of the Civil Procedure Code, for review of the judgment of the High Court, dated the 5th day of December, 1979 in C R. P. No 2612 of 1979 presented to revise the Order of the Court of the Subordinate Judge, Madurai, dated 10th October, 1979 and made in C. M. No. 283 of 1979 against (I. A. No. 287 of 1979 in R. C. O. P. No. 476 of 1978, D. M. C., Madurai Town).

T. R. Mani, for Petitioner.

Somayajulu for *Aiyar and Dolia*, for Respondent.

The Court made the following

ORDER.—The landlord is the petitioner herein, who filed a petition under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, asking for additional accommodation. He filed I. A. No. 287 of 1979 for amending the petition by stating that due to typographical error, Door No 16, Manjanakara Street, was not mentioned and Door No. 51, Mahal Street, Madurai, alone was mentioned, but the description of the property in the petition would necessarily include both the door numbers.

2. Both the authorities held that the description in the petition would necessarily inculde both the door numbers and no prejudice could be caused to the tenant by allowing the amendment, because he has already raised his defence in respect of the entire premises leased to him, he being the tenant of both the door numbers. It is a corner building in which, in the major portion, the landlord is carrying on his business. Door No. 16, faces Manjanakara Street, whereas door No. 51 faces Mahal Sixth Street, Madurai.

3. Aggrieved against this order, C. R. P. No. 2612 of 1979 was filed contending that an amendment cannot be allowed and there is no jurisdiction in the authorities to allow such amendments. Counsel appearing for the petitioner by relying upon the decision reported in *Ramachandracharyulu* v. *Rangacharyalu*[1], was able to convince this Court that the proposed amendment could be allow

1 (1926) 51 M. L. J. 418 : A. I. R. 1926 Mad. 1117.

ed. But during the course of hearing, the counsel for the tenant pleaded that it is not a genuine omission, but knowingly the petition had been filed only for one of the door numbers, and each one of the premises is covered by a separate lease deed and rent was also being paid separately. He relied upon Exhibits B-3 and B-4 to contend that till 1974, rent was being paid separately, and in the manner in which the point is put in the Civil Revision Petition, it was never canvassed before the authorities, and therefore, it will be possible to the tenant to establish that there are two distinctive tenancies, and by amending the petition, he cannot secure additional accommodation in respect of two premises. It is to find out these factual particulars this matter was remanded, and while so remanding this Court directed that in the event of two separate tenancies being made out, the landlord will have to file two separate petitions, and he cannot get over this aspect by seeking to amend the petition, and if it is held that it is a common tenancy and entire rent was being paid in lump sum, it will be treated as one lease transaction and then the proposed amendment may be allowed.

4. This review petition is filed by the landlord stating that, there is no need for remand, and even if there are two tenancies, a single petition is maintainable, in view of the Division Bench decision in *R. Venkatesachary* v. *The Judge, Court of Small Causes, Madras*[1], and when such is the position, the amendment, as proposed, cannot be considered as prejudicial to the interests of the tenant or contrary to law. It is also claimed that there is no need to file two separate petitions, and therefore the remand made is unnecessary and hence the order requires to be reviewed. This petition is filed by invoking the provisions of section 114 and Order 47, rule 1, Civil Procedure Code.

5. Counsel appearing for the respondent-tenant contended that when there are two tenancies, two separate petitions, will have to be filed because each one is a 'building' within the meaning of Act XVIII of 1960 and when additional accommodation is sought for, it has to be established by the landlord that both the premises are required for his occupation and it cannot be done by filing one petition, and hence the order of remand does not call for any interference.

6. Mr. T. R. Mani, counsel appearing for the petitioner herein, apart from the decision above referred to also relies upon the decision in *P. Govindaswami Naicker* v. *S. R. Kerwar*[1] and the decision in *S. Gopalakrishna Chetty* v. *Ganeshan*[2].

7. In the decision in *R. Venkatesachary* v. *The Judge Court of Small Causes, Madras*[3], in respect of a matter arising under Tamil Nadu Act XV of 1946, it was held that though the definition of a building in the Act includes a portion, of the building, it does not mean that the owner of a house, portions of which have been let separately, cannot file an application for obtaining possession of the entire house as a building. What is sufficient for the landlord is not the question, but whether he requires the entire building '*bona fide*' for his occupation has to be decided.

8. In the decision in *P. Govindaswami Naicker* v. *S. R Kerwar*[1], it was held that there is no need for distinct petitions against each of the tenants to be filed, because of the definition "building" in respect of which the relief is asked for against several tenants and the real question is whether there has been any prejudice caused by the procedure adopted by filing a single petition, and there could be no impediment in filing a single petition, by the landlord in respect of several tenancies in the same building.

1. (1949) 2 M. L. J 784: A. I. R. 1950 Mad. 366.

1. (1969) 2 M. L. J. 452.
2. (1976) 1 S. C. J. 358: (1976) 1 S. C. R. 273 : A. I. R. 1975 S.C. 1750.
3. (1949) 2 M. L. J. 784 : A.I.R. 1950 Mad. 366

9. In the decision in *S. M. Gopalakrishna Chetty* v. *Ganeshan*[1] in respect of a matter arising under Act XVIII of 1960, the contention raised that a single petition with regard to different tenancies cannot be filed, was repelled by holding :

> "Mr. Natesan faintly submitted that a single petition with regard to two different tenancies, although in the same premises, one for residential and the other for non-residential purpose, is not maintainable. We do not find any substance in such a contention when the tenancy is one."

10. Mr. Somayajulu, by referring to the decision reported in *T. N. Unnamalai Achi* v. v. *Saminatha Pathar*[2] contends that clubbing together in an eviction petition of residential and non-residential premises is not permissible, and that in the said case, there were three different premises; two being residential and the third one non-residential, and this Court held :

> "Merely because a consolidated rent is being paid for the three premises from a particular point of time, it is not permissible for the landlord to club the three premises together for seeking the relief against the tenant only under section 10 (3) (*a*) (*i*) of the Act."

> "By clubbing the three premises, together, the landlord cannot seek the eviction of the tenant from the non-residential premises when he has not put forth a case for that relief."

11. In the light of the two decisions particularly the decision in *P. Govindaswami Naicker* v *S. R Kerwar*[3] and the decision in *P Venkatesachary* v. *The Judge, Court of Small Causes, Madras*[4] and the decision of the Supreme Court *M. Gopalakrishna Chettv* v. *Ganeshan*[1] it cannot any longer be pleaded that a landlord cannot file a single petition in respect of different tenancies, particularly when the same tenant is in occupation of the concerned premises. The Supreme Court has held that a single petition with regard to more than one tenancy in the same premises is maintainable, when the tenancy is one.

1. (1976) 1 S.C.J 358 : (1976) 1 S.C.R. 273 : A.I.R. 1975 S.C. 1750.
2. (1980) 93 L.W. 404.
3. (1969) 2 M. L. J. 452.
4. (1949) 2 M. L. J. 784 : A. I. R. 1950 Mad. 366.

12. It was pleaded in this case that a monthly rent of Rs 680 was being paid for both the tenancies by single payment. But it is only in the civil revision petition. it is pleaded that there were different tenancies, and that this aspect requires to be investigated. But for this claim this Court would have confirmed the concurrent findings of the two statutory authorities.

13. In view of the decision rendered by the Supreme Court and that of the Division Bench, above referred to the decision reported in *T. N Unnamalai Achi* v. *Saminatha Pathar*[1] can have no application. The right of a landlord who seeks for additional accommodation to file a single petition in respect of different tenancies, having been held to be a proper petition, the tenant can no longer claim that the proposed amendment cannot be allowed.

14. It was just before orders could be pronounced allowing the review petition, in view of the binding decisions above referred to, Mr. Somayajulu, raised an objection that this Court has no power to review its order, since such a provision is not found in Act XVIII of 1960. Hence the petition had to be adjourned more than once for further arguments.

15. Mr. Somayajalu, relied upon the decision reported in *S. J S. Fernandes* v. *V. Ranganayakalu Chetty*[2] which arises under 1949 Act, wherein it was held that inasmuch as the Act contains no provision for review, there can be no question of any inherent power in the Court, and the Code of Civil Procedure not being applicable,

1. (1980) 93 L. W. 404.
2. (1952) ? M. L. J. 445: 65 L. W. 1101 :A. I. R. 1953 Mad. 236.

there is no scope forre viewing the order passed by this Court in revision. When the provisions of the Civil Procedure Code are not made applicable in a self contained enactment, there is no scope for invoking section 114 or Order 47, rule 1, Code of Civil Procedure. Inherent powers of a Court would not extend to exercise of the power of review which practically results in hearing an appeal by the same functionary who had decided the case; and such a power can be exercised only if it is specifically provided for. There is no concept for inherent power vested in a judicial Officer to review his own order. Hence, it was held that a review petition is not maintainable in respect of the proceedings initiated under Madras Buildings (Lease and Rent Control) Act, 1949.

16. He would then refer to the decision in *P. N. Thakershi* v. *Pradyunansinghji*[1] wherein it was held that the power to review is not an inherent power and it must be conferred by law either specifically or by necessary implication. When there is no provision in the Act conferring such a power of review, it cannot be exercised. Thus by relying on these two decisions, he would contend that there being no provision in T. N. Act XVIII of 1960, to review an order passed under section 25 of the Act, the present petition deserves to be dismissed.

17. For the proposition that the provisions of the Civil Procedure Code are not applicable in respect of proceedings initiated under Act XVII of 1960, he refers to the decision reported in *Seethalakshmi Ammal* v. *Rajammal*[2] wherein it was held that a Rent Controller is not a Court and Civil Procedure Code is not applicable. In the decision in *Syed Hanifa* v. *Muhammad Khalifulla*[3] it was held similarly, that the order of a Rent Controller is not an order of a civil Court, and therefore, no revision would lie under section 115 of the Civil Procedure Code. In the decision in *Abdul Wahid Sahib* v. *Dewanjee Abdul Khader Sahib*[1] dealing with the applicability of section 24 of the Code of Civil Procedure in respect of proceedings under Act XV of 1946, it was held that the Rent Controller is a *'persona designata'*, and therefore it is not a Court subordinate to the High Court, and the provision under the Civil Procedure Code could not be invoked. In the decision in *Rayala Corporation (Madras)* v. *Syed Bawker & Co., Madras*[2] it was held by the Division Bench, that the Controllers under 1949 Act are no doubt persons belonging to the judicial service, ... but when they hear any petition filed under the said Act, they are not Courts, and therefore, the Code of Civil Procedure will not cover these proceedings. In the decision reported in *Rajam Ayyar* v. *Pavanambal*[3], it was held that a revision under section 115 of the Civil Procedure Code, would not lie because the appellate authority acting under the said Act, is a *'persona designata'*.

1. A. I. R. 1970 S. C. 1 73.
2. (1965) 1 M. L. J. 287.
3. (1969) 1 M. L. J. 413 : (1969) M. L. J. (Crl.) 58 81 L. W. 592: A. I. R. 1970 Mad. 39.

18. In the decision in *Devichand Moolchand* v. *Dhanraj Kantilal*[4] a Division Bench held that the provisions of the Code of Civil Procedure would not apply, and in the absence of any such provision there can be no relief, and the necessity for a rule to be made providing in appropriate cases for the bringing on record of legal representative on the death of the original applicant was also pointed out.

19. In the decision in *T. K. Chennakesavalu* v. *Mansukhlal*[5] it was held that under Act XVIII of 1960, Civil Procedure Code, is not applicable as such as to the Rent Controller, and that he can only exercise the powers to the extent provided under rule 26 of the Rules framed under the Act.

1. (1947) 1 M. L. J. 207: 60 L. W. 199 : I. L. R. (1948) Mad 43: A. I. R. 1947 Mad. 490.
2. (1957) 1 M. L. J. 249: I. L. R. (1957) Mad 856: 70 L. W. 345 A. I. R. 1957 Mad. 385.
3. (1949) M. L. J. 4 9: 62 L. W. 245: A. I. R. 1949 Mad. 787.
4. (1948) 1 M. L. J. 276: 61 L. W. 267: A. I. R. 1949 Mad 53.
5. (1966) 1 M. L. J. 330.

20. In the decision reported in *K. R. Sankar* v. *Buvanambalammal*[1], a division Bench of this Court held that the Controller is not a 'Court', and the investiture of power under section 2 (3) of this Act is on a *persona designata* and not on a Court.

21. Mr. T. R. Mani, counsel for the petitioner refers to the decision reported in *Usman Koya* v. *Muthukrishnan*[2] wherein it was held that the Rent Controller and the Appellate Authority, though '*persona designata*' they exercise only quasi-judicial powers and therefore they have the jurisdiction to rectify the mistake particularly regarding the re-deposit of the amount regarding which there was an error committed by the petitioner.

22. In the decision in *Thirupathi Nadar* v. *Kandaswami Nadar*[3] while dealing with the scope of the powers under section 25 of the Act, this Court held that the District Court functioning under section 25 of the Act not being a Tribunal acting *persona designata*, but being one functioning as an ordinary civil Court, can apply the provisions of the Code of Civil Procedure, as the procedure provided in the Code should be followed by it in all proceedings before it, as a Court exercising civil jurisdiction.

23. These decisions have been placed to contend that when the provisions of the Code of Civil Procedure would not apply to proceedings initiated under Act XVIII of 1960; the filing of this review petition by invoking section 114 and Order 47, rule 1, Civil Procedure Code, is erroneous, and therefore the petition itself not being maintainable, there can be no consideration of any of the points canvassed in this petition.

24. The Rules framed under Act XVIII of 1960 provide for the procedure to be followed by the Rent Controller and the Appellate Authority and deal with certain aspects of the procedure to be followed in certain contingencies. When such a provision is made about the procedure to be followed, in the light of plethora of authorities which have been placed, it is quite obvious that the provisions of the Civil Procedure Code, as such, cannot be invoked while dealing with the petitions arising under Act XVIII of 1960.

25. Mr. T R. Mani, counsel for the petitioner contends that the decisions relied upon pertain to the exercise of powers by the Rent Controller or the Appellate Authority, who are the creatures of the statute, but so far as the High Court is concerned, it exercises powers which is not confined to what is found under section 25, and it possesses inherent powers and therefore a review is maintainable. If it be held that there can be no inherent power of review by a Court, even then since the High Court has to adopt the procedure under Civil Procedure Code, the power of review is available, and in this case, the petition filed is maintainable. It is to highlight this point, he refers to section 2 (3) of the Act which deals with definition of 'Controller' which means any person appointed by Government by notification. Section 23 (1) of the Act deals with appeals and only such officers and authorities, as notified by Government by general or special order can function as appellate authority. Under section 23 (4), the decision of the Appellate Authority and subject to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any 'Court of law' except as provided under section 25 of the Act. He would then refer to section 18 of the Act wherein it is provided that when execution is taken, the order passed by the Controller and Appellate Authority is to be treated as an order of a civil Court and for the purpose of execution the Controller shall have all the powers of a civil Court. Lastly coming

1. (1971) 1 M. L. J. 230: 84 L. W. 134: A. I. R. 1971 Mad. 368.
2. (1977) T. L. N. J. 273.
3. (1968) 81 L. W. 642.

to section 25 which provides for revision to this Court against the order of the Appellate Authority, he emphasises on the power being conferred in 'the High Court'. It is 'the High Court' that has been conferred with a wide power to be exercised to go into the regularity of the proceedings or the correctness or legality or propriety of the decisions passed by the Appellate Authority and it is open to this Court to modify, annual, reverse or remit for reconsideration any of the matters and such an application is to be filed to the High Court.

26. The point taken has to be considered by first referring to nature of personnel who are to exercise powers under the Act in the first two stages. Any 'person' can be appointed as a 'Controller' by notification. It is not necessary that it should be a Court. Equally in respect of an appellate authority, 'any officer or authority' can function as Appellate Authority. These two categories of functionaries can be notified by the Government under the Act. Invariably Judicial Officers are being appointed, but that would not mean that the power exercised by them is that of a Court, and that is why this Court has held in more than one decision that they are '*persona designata*'.

27. But when a revision is to be filed under section 25 of the Act, it is not to a notified 'person or officer or authority' who or which is to exercise the revisional power but, it is 'the High Court', which entertains the revision petitions. When the High Court has been conferred with powers to entertain the revision under section 25 of the Act, as held in *Thirupathi Nadar* v. *Kandaswami Nadar*[1], when a Court is invested with powers to adopt the procedure applicable to it, there is necessity for invoking the Code of Civil Procedure. No procedure having been contemplated in the Rules, to be adopted by the High Court and when the High Court is a Court of record, the necessary implication is, the Court will have to decide the revision petitions by following the Civil Procedure Code. In the decision, it has been hitherto held that the High Court is a '*persona designata*' under the Act, or that when the matter is further taken up to the highest Court of the land, it would function as a '*persona designata*' under the Act. As for those decisions wherein it was held that section 115 of the Code of Civil Procedure cannot be invoked they are all cases which arose under 1949 Act, wherein a similar provision as in section 25 of the Act, had not been incorporated. No provision for a revision to the High Court was provided for in that Act. When revisions were sought to be filed against orders passed by '*persona designata*', they were rightly repelled.

28 Mr. Somayajulu, has no doubt referred to section 18 of the Act, wherein it is stated that an order passed under section 25 executed by the Controller has to be treated as an order of a civil Court, and for that purpose, the Controller shall have all the powers of a civil Court, and therefore if the power is exercised under section 25 as that of a civil Court, there is no need to mention in section 18 that such an order is to be treated as an order of a civil Court. But for this solitary objection, he has not been able to point out any other section in the Act or any rule framed thereunder, wherein there is prohibition against the High Court adopting the Code of Civil Procedure, while disposing of the revision petition under section 25 of the Act. In section 18, orders passed by the Controller and the Appellate Authority, being orders passed by '*persona designata*' there was the need to state that while executing such orders, it has to be treated as if they are orders of a civil Court. Orders passed under section 25 of the Act will have to be executed only by the Controller, who is a notified person, but who is to function with all the powers of a civil Court while executing orders. It is in this context, section 25 is clubbed with other sections which pertain to order passed by a heirarchy of forums, to construe all of them alike relating to powers to be exercised by him. Hence as contended be Mr. Somayajulu, section 18 of the Act, cannot be construed as to indicate that the order passed under section 25 is not an order of Court and is equatable to orders passed by Controllers and Appellate Authorities.

1. (1968) 81 L. W. 642.

Section 18 of the Act cannot therefore be taken as a basis for holding that in disposing of revision petitions, under section 25 of the Act, the High Court is not to adopt the Code of Civil Procedure. No Court can function without an established and prescribed procedure. If the Act or Rules framed thereunder prescribes a procedure to be followed which is different from the procedure which is adopted by the Court, then this contention of Mr. Somayajalu, could have some force.

29. At this juncture, it will be relevant to note that under section 34 of the Act, Government by notification, can make Rules. Section 34 (2) (*b*) enables Rules to be made regarding 'the procedure to be followed by Controllers and Appellate Authorities in the performance of their functions'. Clauses (*c*), (*d*) and (*e*) to said sub-section, deal with issue of notices, setting aside *ex parte* orders; and bringing on record legal representatives in respect of proceedings taken under the Act; and clause (*f*) enables framing of Rules regarding procedure to be followed in taking possession of the building, and finally clause (*g*) prescribes the fee leviable in respect of Applications and Appeals under the Act.

30. The Rules framed deal only regarding the procedure to be followed by the Controllers and Appellate Authorities, and on the other aspect covered by clauses (*c*) to (*g*) of section 34 (2) of the Act. When the Legislature has enabled the Government to prescribe Rules only for Controllers and Appellate Authorities as to the procedure to be followed by them, it is clear that regarding the procedure to be followed by the High Court while entertaining a revision under section 25 of the Act, it has to adopt the procedure which it follows in respect of proceedings instituted before it. Being fully aware of the applicability of the Civil Procedure Code in the High Court, it has refrained from any other procedure being formulated for disposal of revisions by it. The intendment of the Legislature being quite clear, the provisions of the Code of Civil Procedure would be applicable.

31. Further it is indisputable that the High Court being a Court of Record, and in all its proceedings, it follows a prescribed procedure the necessary implication is that the provisions of the Code of Civil Procedure alone would apply. It is precisely in this view in *Thirupathi Nadar* v. *Kandasami*[1] the passage in *Telphone Company* v. *Postmaster-General*[2], was relied upon which is to the effect :

> "Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think that the Court will determine the matter as a Court. Its jurisdiction is enlarged but all the incidents of such jurisdiction including the right of appeal from its decisions remain the same."

In *Adaikkappa Chetti* v. *Chandrasekhara Thevar*[3] which was also relied upon in the decision in *Thirupathi Nadar's case*[1], the relevant passage is:

> "The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto . . . . "

32. The power of revision conferred under section 25 of the Act is on 'the High Court' and while entertaining the revision it exercises the power of a Court created under the Constitution. It is not a '*persona designata*' When power is conferred on a Court, and no other special procedure is prescribed for disposal of matters under a particular statute as held in *P. M. Thakershi* v. *Pradyumansinghji*[4] by such conferment of power, there is necessary implication that the Code of Civil Procedure would apply and in turn

1. (1968) 81 L. W. 642.
2. L. R. (1913) A. C. 546 at 562.
3. L. R. (1947) 74 I. A. 264 : 61 L. W. 52 : (1948) 1 M. L. J. 4 : A. I. R. 1948 P. C. 12.
4. A. I. R. 1970 S. C. 1273.

the power of review would be available to this Court.

33. Therefore the procedure to be followed in disposing of revision under section 25 of the Act, being governed by the provisions of the Code of Civil Procedure, the power of review having been conferred therein expressly this review petition is maintainable.

34. The decision of the Supreme Court in *S. M Gopalakrishna Chetty* v. *Ganeshan*[1] and the division Bench decision of this Court in *R. Venkatesaachary* v, *The Judge, Court of Small C uses, Madras*[2] are to the effect that a single petition can lie in respect of different tenancies provided it is in respect of the same 'building'. Hence the amendment proposed and which has been ordered by the two statutory au horities is confirmed, and the Rent Controller can further proceed to dispose of the matter on its merits, without the need to go into the question of finding out at this stage of amendment of petition, as to whether there is a single tenancy or two tenancies. It there is need to consider whether there is a single tenancy or two tenancies for the proper disposal of the petition in it's merits, it will be a different matter. For the purpose of carrying out the amendment, the direction already is sued not being necessary, it results in confirmation of the order of the Appellate Authority, and in the dismissal of the Civil Revision Petition No 2612 of 1979. To this effect the review petition is allowed.

S. J. —— *Review petition allowed.*

1. (1976) 1 S. C. J. 358 : A. I. R. 1975 S. C. 1750.
2. (1949) 2 M. L. J. 784 : A. I. R. 1950 Mad, 366.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

Mohammed Khan Sahib *Appellant**

v.

Ali Khan Sahib and another ... *Respondents.*

Mahomedan Law — Acknowledgment of paternity — Doctrine of — Based on assumption of lawful union between the parents of the acknowledged child—Where marriage is disproved acknowledgment cannot confer legitimacy.

The plaintiff was the son of 'K' through his wife 'B'. The defendants were the sons of 'K' through another wife 'H'. As per Exhibit A-1, the marriage between 'K' and H was on 3rd January, 1921 and as per the birth extracts, Exhibits A-2 and A-3, the defendants were born long prior to the marriage between 'K' and 'H'. The plaintiff had filed a suit for a declaration that the defenda ts were not the legitimate sons of his father and to restrain them from interfering with the plaintiff's management and administration of Saint Veli-yullah Thaikkal The trial Court held that the defendants were legitimate sons as there was a valid acknowledgment. However, on appeal, the lower appellate Court held that there was no marriage between 'K' and 'H' at the time of the birth of the defendants and therefore they could not be made legitimate by acknowledgment of their legitimacy by the father. The 1st defendant preferred a second appeal.

Held, As there was no marriage between the plaintiff's father and the defendants, mother prior to their birth as evidenced by Exhibits A-2 and A-3, they could not be held to be the legitimate sons of the plaintiff's father by relying on the doctrine of "acknowledgment". A child born of "zina" could

*S A. No. 525 of 1977. *4th November, 1980.*

not be made legitimate by acknowledgment. Similarly the defendants who were born before the date of their mother's marriage with the plaintiff's father could not be "held to be legitimate sons of the plaintiff's father by relying on the doctrine of acknowledgment. [*Para.* 5.]

The Mahomedan law of acknowledgment of paternity could.be invoked only where the factum of marriage or the exact time of marriage had not been proved. The doctrine of acknowledgment is based on the assumption of a lawful union between the parents of the acknowledged child. The doctrine, however, is not applicable where the lawful union between the parents of the child is not possible as in the case of incestuous inter course or an adulterous connection. The doctrine is also, not applicable where the marriage necessary to render a child legitimate is disproved. [*Para.* 4.]

Case referred to :—

Sadki Hussain Khan v. *HasimAli khan*, I.L.R. 1916) 38 All. 627.

Appeal against the decree of the Court of the Subordinate Judge, Karaikal, dated 31st January, 1976 and passed in Appeal Suit No. 20 of 1974 preferred against the decree of the Court of District Munsif, Karaikal, in Original Suit No. 9 of 1973.

A. J. Abdul Razack and *M. A. M. Azeez Rahiman*, for Appellant.

K. Yamunan, for Respondents.

he Court delivered the following

JUDGMENT.—The plaintiff is the son of Abdul Azeez Khan through his wife Amina Beevi. The defendants are the sons of the said Abdul Azeez Khan through his another wife Hairoon Beevi As per Exhibit A-1 the marriage between the said Abdul Azeez Khan and Hairoon Beevi was on 3rd January, 1921 and as per the birth extracts Exhibits A-2 and A-3 the defendants were born long prior to the marriage between Abdul Azeez Khan and Hairoon Beevi. The plaintiff's case is that the defendants are the illegitimate sons of his father in view of the fact they were born prior to the marriage between his father and Hairoon Beevi. The plaintiff has hence filed a suit for declaration that the defendants are not the legitimate sons of his father and to restrain them by means of a permanent injunction from interfering with the plaintiff's management and administration of Saint Veli-Yullah Thaikkal. The defendants' contention is that these was a valid marriage between Abdul Azeez Khan and their mother Hairoon Beevi and their father has acknowledged them as his sons.

2. The trial Court held that the identity of the persons mentioned in the certificatei Exhibits A-2 and A-3 have not been proved and as there is a valid acknowledgement, the defendants are the legitimate sons of the plaintiff's father Abdul Azeez Khan. On appeal, the lower appellate Court held that Exhibits A-2 and A-3 relate to the defendants and at the lime of the birth of the defendants, there was no valid marriage between Abdul Azeez Khan and Hairoon Beevi, the mother of the defendants and as the defendants are the illegitimate sons of Abdul Azeez Khan, they cannot be made legitimate by acknowledgment of their legitimacy by the plaintiff's father. The 1st defendant has preferred the second appeal before this Court.

3. The learned counsel for the 1st defendant-appellant contended that the defendants' mother had been treated as his wife by the father of the plaintiff, and defendants have been continuously living together under the same roof and properties were also allotted to the defendants in the family partition in 1953 and as family members, the defendants have been permitted to apply sandalwood paste to the graveyard of a Muslim Saint and as there has been a valid acknowledgement of their legitimacy by the plaintiff's father, they should be held as the legitimate sons of the plaintiff's father.

4. The leading case on the dectrine of acknowledgment is the decision of the Privy

Council in *Sadki Hussain Khan* v *Hasim Ali Khan*[1], wherein it was held that in cases of uncertainty of legitimate descent, an acknowledgment by the father raises a presumption of legitimacy unless the other side can prove that the boy whose paternity was acknowledged was of illegitimate descent. The Privy Council has further pointed out that when a man and a woman have cohabited continuously for a number of years, the law presumes in favour of marriage and against concubinage and an acknowledgment involves the assertion that the father was married to the acknowledgee's mother. So when a son has in his favour a good acknowledgment of legitimacy the marriage will be held to have been proved and legitimacy established unless the marriage has been disproved. It is, therefore, clear that where the paternity of a child cannot be proved by establishing the marriage between its parents at the time of its conception or birth, Mahomedan Law recognises "acknowledgment" as a method whereby such marriage and legitimate descent can be established for the purpose of inheritance. The Mahomedan Law of acknowledgment of paternity can be invoked only where the factum of marriage or the exact time of the marriage has not been proved. The doctrine of acknowledgement is based on the assumption of a lawful union between the parents of the acknowledged child. The doctrine, however, is not applicable where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or an adulterous connection. The doctrine is also not applicable where the marriage necessary to render a child legitimate is disproved.

5. In the instant case it can be seen from Exhibit A-1 that the marriage between plaintiff's father and defendants' mother took place on 3rd January, 1921, whereas the defendants, as per Exhibits A-2 and A-3 were born to their parents long prior to the marriage. The finding of the trial court that the identity of the persons mentioned in Exhibits A-2 and A-3 have not been proved is clearly erroneous since the father's name and the mother's name of the child are mentioned both in Exhibits A-2 and A-3 and they clearly refer only to the plaintiff's father and the defendants' mother. The contention that the residential addresses are not mentioned in Exhibits A-2 and A-3 and hence they cannot be taken as relating to the defendants cannot be accepted since there is no column under Exhibits A-2 and A-3 to give the residential address of the parents of the child. The descriptive particulars mentioned in Exhibits A-2 and A-3 regarding the parents of the child are sufficient to indicate that the birth certificates relate only to the defendants. There is also the evidence of P. W. No. 1 which clearly establishes that the birth certificates Exhibits A-2 and A-3 relate only to the defendants. The genuineness of Exhibits A 2 and A-3 cannot be doubted since they are official documents maintained according to the procedure contemplated under the French Code Civil. Except for a bare denial that Exhibits A-2 and A-3 do not relate to them, the defendants have not come forward to establish the actual date of the marriage of their father with their mother Hairoon Beevi or their actual date of birth. The father's name and mother's name given in Exhibits A-2 and A-3 are the same as the name of the plaintiff's father and defendants' mother and they cannot be brushed aside just as a mere coincidence. The trial Court's finding that in Karaikal region there are many Muslim parents having the same name as mentioned in Exhibits A-2 and A-3 cannot be accepted as there is absolutely no evidence in support of that finding. It therefore, follows that at the time of the birth of the defendants there was no valid marriage between the plaintiff's father and their mother Hairoon Beevi and as the defendants were born during the pre-marital stage, they cannot be considered as the legitimate sons of the plaintiff's father. There is also no evidence to show that the plaintiff's father had at any time acknowledged their mother Hairoon Beevi as his wife prior to Exhibit A-1. As there was no marriage between the plaintiff's father and the defendants's mother prior to their birth as evidenced by Exhibits A-2 and A-3, they cannot be held to be

1. (1916) I. L. R. 38 All. 627.

legitimate sons of the plaintiff's father by relying on the doctrine of "acknowledgment". A child born of "Zina" cannot be made legitimate by acknowledgment. Similarly the defendants who were born before the date of marriage with the plaintiff's father cannot be held to be legitimate sons of plaintiff's father by relying on the doctrine on acknowledgment.

6. In the result, the judgment of the lower appellate Court is confirmed and the appeal fails and stands dismissed, in the circumstances without costs.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Thillai vazh Andanar Annam Palippa Nidhi represented by Trustee, His Holiness Sri La Sri Kasivasi Muthukumaraswami Thambiran Swamigal Avargal Head of Sri Kasi Mutt Thirupanandal ... *Petitioner**

v.

The State of Tamil Nadu represented by Collector of Thanjavur and others ... *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 78—Trust—Proceedings initiated by Authorised Officer (Land Reforms) —Order passed by Authorised Officer on 9th November, 1976 and communicated to Collector on 15th December, 1976—Appeal filed by Collector before the Land Tribunal on 30th April, 1977—Appeal by Collector, held barred by time.

The Authorised Officer (Land Reforms) Thanjavur initiated proceedings against the petitioner. Trust under the Tamil Nadu Act LVIII of 1961 as amended by Act XXXVII of 1972 and he passed an order on 9th November, 1976 holding the petitioner as a religious trust of a public nature and dropped further proceedings under the Act. This order was communicated to the Collector on 15th December, 1976. The Collector filed an appeal before the Land Tribunal in L. T. C. M. A. No. 36 of 1976 on 30th April, 1977. This appeal was allowed by the Land Tribunal by holding that the petitioner Trust was not a public trust of a religious nature and that it was entitled to hold only 5 stanadard acres. Against this order by the Land Tribunal the petitioner Trust filed a revision to High Court and contended that the appeal by the Collector to the Land Tribunal was barred by time prescribed under section 78 of the Act. The petitioner also went into the merits of the order passed by the Land Tribunal.

Held: It is not in dispute that the appeal should have been filed on 15th January, 1977, and that even making provision for the extended period of limitation by the application of section 78 (2) of the Act the appeal ought to have been filed on or before 15th February, 1977. Since the appeal had been preferred by the respondent before the Land Tribunal only on 30th April, 1977 and even after the exercise of the powers under section 78 (2) of the Act the delay beyond 15th February, 1977 could not be condoned, it must he held that the appeal preferred by the respondent in L. T. C M A. No. 36 of 1976, before the Land Tribunal (District Revenue Officer) Thanjavur, was barred. The Land Tribunal, therefore, could not have dealt with this appeal at all as one having been preferred within time. [*Para.* 5.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Land Tribunal (District Revenue Officer) Thanjavur dated 26th November, 1979 and made in L. T. O. A. No. 36 of 1979 (M R. I 6B/Trust/K. B. K. Act XXXVII of 1972, dated 9th November, 1976 Additional Authorised Officer, Land Reforms, Thanjavur.

*C. R. P. No. 2287 of 1980. 21*st October*, 1980.

S. Gopalan and *B. Kumar*, for Petitioner.

N. R. Chandran, for Respondents.

The Court delivered the following

JUDGMENT.— Thillaivazh Andanar Annam Palippu Nidhi, a trust represented by its trustee, is the petitioner in this Civil Revision Petition, which is directed against the order of the Land Tribunal (District Revenue Officer), Thanjavur, holding that the trust in question is entitled to hold only 5 standard acres under section 5 (1) *(d)* *(ii)* of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, LVIII of 1961 as amended by Act XXXVII of 1972 (hereinafter referred to as the Act). The trust in question had been created by the Head of Thiruppanandal Mutt Sri-la-Sri Kasivasi Muthukumaraswami Thambiran, under a deed of trust, dated 16th July, 1954 and the trust held agricultural lands of an extent of 199.33 ordinary acres equivalent to 185.23 standard acres as on 1st March, 1972, in Ukkadai Village, Kumbakonam taluk. The Head of the Mutt has been constituted the trustee of this trust. Proceedings under the Act were initiated against the trust by the Authorised Officer (Land Reforms). In response to a notice in Form 4, the manager of the Mutt representing the trustee filed a statement of objections on 6th November, 1976, and it had been stated therein that though the trust is known as Thillaivazh Andanar Annam Palippu Trust, its purposes are both religious as well as charitable and as the lands held by the trust are controlled by the Kasi Mutt of Thiruppanandal, such trust lands are also exempt under section 2 (3) *(b)* of the Act as amended by Act XXXVII of 1972 on the ground that the lands owned by the Mutt are exempt from the provisions of the Act. The Authorised Officer (Land Reforms), Thanjavur, on a consideration of the terms of the trust deed in the light of the provisions of the Act, held that the trust was formed for religious and charitable purposes and that it is a public trust which was in existence on the date of the commencement Act XXXVII of 1972, that is, on 1st March, 1972 and the trust is a religious trust of a public nature as well. It was also further held by the Authorised Officer that though the lands stand registered in the name of the trust, they are held and administered by the Head of Thiruppanandal Mutt and, therefore, in view of the finding that the trust is a religious trust of a public nature, further proceedings should be dropped. Aggrieved by this, the respondent herein preferred an appeal in L. T. C. M. No. 36 of 1976 before the Land Tribunal (District Revenue Officer), Thanjavur. The Land Tribunal held that the lands in question are held by Thillaivazh Andanar Annam Palippu Trust and not by the Kasi Mutt and that the primary intention of the founders of the trust is only to set apart properties for charitable purpose and hence the trust cannot be treated as a trust for public purpose of a religious nature. In this view, the Land Tribunal concluded that the trust is entitled to hold only 5 standard acres and allowed the appeal. It is the correctnese of this order of the Land Tribunal that is questioned by the trust in this Civil Revision Petition.

2. The learned counsel for the petitioner raised two contentions. The first is, that the appeal in L. T. C M A No. 36 of 1979 preferred by the respondent before the Land Tribunal, Thanjavur, was barred by limitation and, therefore, the Land Tribunal was in error in proceeding to entertain the appeal and dispose of the same. According to the learned counsel for the petitioner, the Authorised Officer (Land Reforms), Thanjavur, passed an order on 9th November, 1976 and this order was communicated to the repondent on 5th December, 1976. Relying upon these dates, the learned counsel for the petitioner submits that under section 78 (1) of the Act, the respondent should have preferred an appeal to the Land Tribunal on or before 15th January, 1977 or at least before 15th February, 1977 with an application to condone the delay and that not having been so done, the appeal filed by the respondent on 30th April, 1977, before the Land Tribunal was clearly out of time. The learned counsel for the respondent, on the other hand, would however accept the correctness of the date of the order of the Authorised Officer as well as the date of receipt of that order by the respondent, but

contends that an application in I. A. No. 759 of 1978 to condone the delay had been made and ordered and, therefore, the petitioner cannot claim that the appeal before the Land Tribunal preferred by the respondent was out of time. Before proceeding to consider these contentions. it is necessary to note certain statutory provisions. It is not in dispute that the Authorised Officer in the present case passed an order under section 9 (2) (*b*) of the Act.

3. Section 78 of the Act provides thus :

"*Appeal to Land Tribunal*—(1) Against any decision of the Authorised Officer under sections (2) (*b*), 10 (3), (4), (5), 16 (3) (*a*) (*iii*), 20, 22, 50, (4), 51 (1), (2), 52, 61 (3) (*b*) or 102 (2) (*b*) the Government may within thirty days from the days of the decision and any person aggrieved by such decision may within sixty days from the date of such decision, appeal to the Land Tribunal.

2. The Land Tribunal may admit an appeal presented after the expiration of the period mentioned in sub-section (1), but not exceeding thirty days if it is satisfied that the party concerned had sufficient cause for not presenting within the said period.

3. On receipt of an appeal under sub-section (1), the Land Tribunal, after giving the parties a reasonable opportunity of being heard, shall—

(*a*) determine a case finally;

(*b*) remand a case;

(*c*) take additional evidence or require such evidence to be taken by the Authorised Officer.

Section 80 of the Act runs thus :

Limitation Act to apply to appeal under section 78 or 79—The provisions of section 4 and of sub-sections (1) and (2) of section 12 of the Indian Limitation Act, 1908 (Central Act IX of 1908), shall as far as may be apply to any appeal under section 78 or 79."

4. The order in the present case had been passed by the Authorised Officer on 9th November, 1976 and communicated to the respondent herein on 15th December, 1976, and according to section 78 (1) read with section 80 of the Act, the appeal before the Land Tribunal should have been presented by the respondent on or before 15th January, 1977. Section 78 (2) of the Act provides for a limited application and exercise of powers analogous to section 5 of the Indian Limitation Act, in that the Tribunal is empowered to admit an appeal presented after the period of thirty days provided the delay does not exceed thirty days and the Land Tribunal is satisfied that the party concerned had sufficient cause for not presenting the appeal within the period of thirty days. Presumably, because of this very limited application of the principle of section 5 of Indian Limitation Act under section 78 (2) of the Act, no reference to section 5 of the Indian Limitation Act has been made under section 80 of the Act.

5. In the present case, it is not in dispute that the appeal should have been filed on 15th January, 1977, and that even making provision for the extended period of limitation by the application of section 78 (2) of the Act, the appeal ought to have been filed on or before 15th February, 1977. But the appeal had been presented before the Land Tribunal only on 30th April, 1977. It is thus obvious that even after invoking section 78 (2) of the Act and exercising the powers thereunder in favour of the respondent, the Land Tribunal did not have the power at all to condone the delay, as even after the exercise of such power, the delay upto 15th February, 1977, alone could have been condoned and not the further delay upto 30th April, 1977. In this view it must be held that the Land Tribunal by reason of section 78 (2) of the Act, did not have the power at all to condone the delay beyond 15th February, 1977, and therefore, the order in I. A No. 759 of 1978 purporting to condone the delay upto 30th April, 1977 cannot be taken advantage of by the respondent to say

that the appeal was filed in time. This position when pointed out to the learned counsel for the respondent, was not disputed by him and indeed, the learned counsel for the repondent fairly conceded that the Land Tribunal did not have the power to condone the delay beyond 15th February, 1977, and that the order in I. A. No. 759 of 1978 purporting to condone the delay upto 30th April, 1977, is of no avail. In view of this, since the appeal had been preferred by the respondent before the Land Tribunal only on 30th April, 1977, and even after the exercise of the powers under section 78 (2) of the Act the delay beyond 15th February, 1977, could not be condoned and this position is also not disputed by the learned counsel for the respondent, it must be held that the appeal preferred by the respondent in L. T. C. M. A No. 36 of 1979 before the Land Tribunal (District Revenue Officer), Thanjavur was barred. The Land Tribunal therefore, could not have dealt with this appeal at all as one having been preferred within time. The first contention of the learned counsel for the petitioner has, therefore to be upheld.

6. The learned counsel for the petitioner next contended that the Land Tribunal erred in its construction of the terms of the trust deed and in arriving at the conclusion that the trust constituted thereunder is a charitable trust In view of the acceptance of the first contention of the learned counsel for the petitioner that the appeal before the Land Tribunal was out of time and could not therefore, be dealt with by the Land Tribunal, it is unnecessary to go into this question The order of the Land Tribunal passed in an appeal presented to it after the period prescribed for such an appeal had expired and even beyond the period of the permitted or excusable delay cannot, therefore, be sustained. Consequently, the order of the Land Tribunal is set aside and that of the Authorised Officer (Land Reforms) restored. The civil revision petition is allowed. No costs.

S. J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—*V. Ratnam, J.*

Srinivasan Chettiar ... *Petitioner**

v.

R. M. Kalyani Ammal .... *Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 23 — Eviction petition — Eviction ordered by Rent Controller — Appeal by tenant — Application by tenant before Appellate Authority to raise additional grounds — Application rejected on ground of absence of provision for permitting the prayer — Revision against rejection — Held that Appellate Authority can receive additional grounds.

The landlord filed on eviction petition under section 14 (1) (*b*) of Tamil Nadu Act (XVIII of 1960) and this was ordered by the Rent Controller. The tenant appealed to the Appellate Authority While the appeal was pending the tenant filed an application before the Authority to receive certain additional grounds. This was rejected on the ground that there was no provision under which additional grounds can be raised. The tenant filed a revision before the High Court.

Held: So long as the appeal had not been disposed of, the granting of permission to raise additional grounds of appeal would be part of the power to decide the appeal itself. This would be so, because under section 23 (3) of Act XVIII of 1960, it is not as if the hearing of appeal is confined only to those grounds raised against the order of the Rent Controller but the decision is on appeal against the order of the Controller as a whole and not limited to only those grounds upon which an appeal had actually been preferred. Though the Appellate Authority constituted

*C. R. P. No. 1594 of 1979.

27th June, 1980.

under the Act is not a Court and consequently it had no inherent powers as such to permit the raising of additional grounds of appeal, yet section 23 (3) would enable the Appellate Authority in the process of hearing the appeal to decide the appeal not only on grounds which have been raised before, but also on other grounds which may be raised later. In the absence of any bar on a litigant analogous to Order 41, rule 2, Civil Procedure Code, such a power in the Appellate Authority is available.

If the appeal had not been disposed of, then the hearing of the appeal in well within the jurisdiction of the Appellate Authority. Therefore, when a party for good and sufficient reasons is able to convince the Appellate Authority that he could not raise a point earlier, it would certainly be open to the Appellate Authority to consider those points and objections as well, as long as the appeal remains undisposed of. Such a power is really part of the power of the Authority to decide the correctness or otherwise of the order of the Rent Controller statutorily committed to it and not an independent inherent power. [*Para*. 5.]

Petition under section 25 of Madras Act XVIII of 1960 as amended by Act XXIII of 1973, to revise the order of the Appellate Authority (Sub-Judge of Madurai), dated 11th June, 1979 in unnumbered I. A. nil of 1979 in C. M. A. No. 410 of 1978.

P. Pandi, for Petitioner.

Abdul Wahab, for Respondent.

The Court made the following

ORDER.—The point debated in this civil revision petition at the instance of the tenant who figures as the petitioner herein is, whether the Appellate Authority functioning under section 23 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, as amended by Act XXIII of 1973 (hereinafter referred to as the Act) and the Rules framed thereunder has powers to grant permission to raise additional grounds in a pending appeal. The respondent herein filed an application in R. C. O. P. No. 655 of 1977 against the petitioner under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act on the ground that she required the building in the occupation of the petitioner for the purpose of demolition and reconstruction. The building, according to the respondent, is an old one and consists of several tenements. Claiming that she had the means to put up the construction and had also submitted a plan for the proposed building and that she required the building in the occupation of the petitioner for the immediate purpose of demolition and reconstruction of a new and a modern building in accordance with the plan submitted, the respondent prayed for an order of eviction against the petitioner giving an undertaking that the entire building will be demolished within three months from the date on which possession is taken.

2. That application was resisted by the petitioner on the ground that since the building consists of several tenements some of which had already been sold to the tenants in occupation, it is not possible to demolish the building and to construct a new building in the site. It was also the further case of the petitioner that the respondent negotiated for the sale of the respective tenements to the tenants including the petitioner and since the respondent wanted a very high price and the petitioner was unable to pay that amount, there was a demand for payment of higher rent which was not agreed to by the petitioner and hence the petitioner claimed that the application for eviction was filed with the oblique motive of securing an order for eviction against the petitioner. The petitioner further set up an agreement, dated 9th April, 1976, entered into between himself and the respondent by which he claimed that he had agreed to purchase the portion in his occupation wherein he is carrying on business and had also paid an advance of Rs. 3,000. The building was

also stated by the petitioner to be a strong one which does not require immediate demolition and reconstruction.

3. The learned Rent Controller (District Munsif) Madurai Town, held on a consideration of the evidence of the Kariasthar of the respondent examined as P. W. 1, the submission of the plan and the undisputed means of the respondent and other circumstances, that the respondent *bona fide* required the premises in the occupation of the petitioner for the purpose of demolition and reconstruction. On this conclusion, an order for eviction was passed against the petitioner granting him two months' time to vacate the premises. Aggrieved by this, the petitioner preferred an appeal before the Appellate Authority (Principal Subordinate Judge), Madurai, under section 23 of the Act. In the Memorandum of appeal, the petitioner had set out the grounds of attack against the order of the Rent Controller. Realising that the plea that the sale agreement between the petitioner and the respondent had brought about a change in the jural relationship of landlord and tenant which existed before and that therefore the respondent is not entitled to file an application for eviction, had not been specifically put forth, the petitioner filed an interlocutory application purporting to be under rule 15 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974, praying to receive certain additional grounds of appeal in this regard filed by the petitioner. The Appellate Authority (Principal Subordinate Judge), Madurai, by its order, dated 11th June, 1979, held that there is no provision in the Act to receive additional grounds in an appeal and that rule 16 (2) brought to its notice by the petitioner has no application whatever to this case and consequently, rejected the petition filed by the petitioner. It is the correctness of this order that is challenged in this revision.

4. The learned counsel for the petitioner contends that the Appellate Authority constituted under section 23 of the Act, though designated as such, is exercising quasi-judicial functions and consequently, it has an inherent power to permit the raising of additional grounds of appeal. Support for this argument is sought to be drawn on the analogy of the power of the Appellate Authority to rectify mistakes made by inadvertence so long as the exercise of such a power does not amount to a review of adjudication already made. In addition, it is also contended that though the Appellate Authority is a statutory functionary under the provisions of the Act, nevertheless it is not divested of its inherent power to permit such proceedings as are rendered imperative by the principles of natural justice, even though there may be no explicit reference to such a procedure either in the Act or in the Rules.

5. Section 23 (1) (*a*) empowers the Government by notification to confer on such officers and authorities as it thinks fit, the powers of Appellate Authorities for the purposes of the Act in such areas and in such classes of cases as may be specified in the order. The right of appeal on an aggrieved person is conferred under section 23 (1) (*b*) of the Act. The power to stay further proceedings pending the decision on the appeal is conferred on the Appellate Authority under section 23 (2) of the Act. Section 23 (2) provides for the manner of disposal of the appeal. That contemplates the calling for the records of the case from the Controller and the giving of an opportunity to the parties of being heard and after such enquiry as may be thought fit either personally or through the Controller rendering a decision in the appeal. Rule 15 prescribes the procedure for the filing of appeals and rule 16 makes provision for the disposal of appeals under section 23 of the Act. Neither rule 15 nor rule 16 throws any light on the power of the Appellate Authority to permit the raising of additional grounds in the appeal before the Appellate Authority. It must be noticed that the Act itself does not contain any provision regarding the application of the provisions of the Civil Procedure Code and indeed, the Act is a self-contained Code as regards the matters provision for which has been made. There are instances which indicate that there is a clear manifestation that the provisions of the Civil Procedure Code are not intended to apply to the proceedings under the Act. The provision for bringing on record the legal

representatives within one month from the date of death or the date of knowledge, as the case may be, is one such. Where the provisions of the Civil Procedure Code are made applicable, then it is so stated. For instance in relation to the provision for the execution of orders of eviction, specific provision is made that the order shall be executed as an order of a civil Court, and that for that purpose the Controller shall have all the powers of the civil Court. It would be thus obvious that but for this such a power would not be available in the Controller. These instances indicate that generally there is an exclusion of the applicability of the provisions of the Civil Procedure Code and where it is either made applicable or intended to apply, provision is made to that effect. It cannot therefore be readily assumed that a provision like Order 41, rule 2, Civil Procedure Code, which prohibits an appellant from urging or putting forth any ground of objection not set out in the memorandum of appeal without leave of Court, applies to an appeal before the Appellate Authority constituted under section 23 of the Act. From the language of section 23 of the Act, it is clear that the Appellate Authority constituted under section 23 of the Act is not a Court as normally understood and accepted and consequently, the procedures of a civil Court cannot be applied to those authorities. But then the question still remains whether in the absence of any specific provision either in the Act or in the Rules, a litigant who has by inadvertence omitted to raise a ground of objection against the order of the Rent Controller should be precluded from doing so. To negative the putting forth of such a ground would be to bar a party from setting out what might be a vital objection to the order appealed against and in my view, so long as the appeal has not been disposed of, the granting of permission to raise additional grounds of appeal would be part of the power to decide the appeal itself. This would be so, because under section 23 (3) of the Act, it is not as if the hearing of the appeal is confined only to those grounds of appeal raised against the order of the Rent Controller but the decision is on appeal against the order of the Controller as a whole and not limited to only those grounds upon which an appeal had actually been preferred. Though the Appellate Authority constituted under the Act is not a Court and consequently it had no inherent powers as such to permit the raising of additional grounds of appeal, yet section 23 (3) would enable the Appellate Authority in the process of hearing the appeal to decide the appeal not only on grounds which have been raised before, but also on other grounds which may be raised later. In the absence of any bar on a litigant analogous to Order 41, rule 2, Civil Procedure Code, such a power in the Appellate Authority is available. The conduct of the appeal so long as it is pending is entirely in the hands of the Appellate Authority, that Authority being statutorily vested with the authority to decide. If the appeal had not been disposed of, then the hearing of the appeal is well within the jurisdiction of the Appellate Authority. Therefore, when a party for good and sufficient reasons is able to convince the Appellate Authority that he could not raise a point earlier, it would certainly be open to the Appellate Authority to consider those points and objections as well, as long as the appeal remains undisposed of. Such a power is really part of the power of the Authority to decide the correctness or otherwise of the order of the Rent Controller statutorily committed to it and not an independent inherent power. In the present case, if the petitioner is permitted to raise the additional points sought to be raised by him, no prejudice will be caused to the respondent because the necessary facts have already been pleaded before the Rent Controller and the respondent has not been in any manner taken by surprise. For the aforesaid reasons, the Appellate Authority was in error when it declined to permit the petitioner to raise the additional grounds in support of his appeal now pending before it. Consequently, the order of the Appellate Authority rejecting the application filed by the petitioner is set aside and it is directed to entertain the application and permit the petitioner to put forth additional grounds in support of the appeal. The civil revision petition is allowed accordingly. No costs.

S. J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Padmanabhan, J.*

Dalmia Magnesite Corporation, Salem represented by its Manager, Mr. K. Srinvasan ... *Petitioners**

v.

The Regional Labour Commissioner (Central), Shastri Bhavan, Madras and another ... *Respondents.*

Payment of Gratuity Act (XXXIX of 1972), section 2 (c)—"Continuous service"—Meaning of.

"Continuous service" under section 2 (*c*) of the Payment of Gratuity Act means uninterrupted service for one year. Absence of an employee for reasons mentioned in the main definition of section 2 (*c*) will not cause interruption in service. If an employee is absent for any other reason or on account of any circumstances other than that mentioned in the main definition in section 2 (*c*) of the Act, he cannot be said to be in uninterrupted service In such cases to be eligible to receive gratuity he must fulfil the conditions in *Explanation I* to section 2 (*c*) of the Act according to which he must have actually worked for not less than 240 days if he is not employed in seasonal establishment or below the ground in a mine. [*Para.* 11]

It is to provide for cases where an employee has put in only interrupted service for one year, the *Explanation I* to section 2 (*c*) of the Act has been introduced to enable him to be eligible to get gratuity notwithstanding that his service was interrupted. [*Para.* 9.]

Reading the main definition as well as the *Explanation I* together, it is clear that Parliament while, using the word "actually" before the word "employed" intended that the employee should have worked for 240 days. Otherwise the word "actually" would have been a surplusage. If really Parliament meant that an employee would be entitled to gratuity if he had been employed for 240 days in cases other than mines and for 190 days in the case of mines there was no necessity for Parliament to define "Continuous service" as "uninterrupted service", service uninterrupted by sickness, accident, leave, lay-off, strike or lock-out or cessation of work not due to the fault of the employee concerned. [*Para.* 9.]

Case referred to:—

Bombay Union Dyeing and Bleaching Mills v. *N. T. More.* (1980) Mah L. J. 171 : (1980) 1 L. L. N. 352.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in payment of gratuity Appeal No. 15 of 1977 and quash the order dated 28th February, 1978 and made therein.

T. S. Gopalan, P. Ibrahim Kalifulla and *S. Ranganathan,* for Petitioners.

K. Chandran, for *Row* and *Reddy,* for Respondents.

The Court made the following

ORDER.—The second respondent Jayapal was in the service of the petitioner, Dalmia Magnesite Corporation, Salem for seven years from 1st September, 1969 to 15th October, 1976 on which date he resigned from service. The petitioner rejected the claim of the second respondent for gratuity on the ground that he had not put in 'Continuous service' as required under the provisions of the Payment of Gratuity Act, 1972. The second respondent filed an application

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*W. P. No. 1505 of 1978.

12th November, 1980.

before the Controlling Authority under the Act. The petitioner contended that the second respondent had not actually worked for 240 days excluding the days of absence on account of sickness, accident, leave, lay off, strike or lock out and weekly holidays and therefore, he was not in continuous service as defined under the Act. The Controlling Authority negatived the contention of the petitioner and held that the second respondent was entitled to gratuity for the period of his service. The petitioner preferred an appeal nnder section 7 (7) of the Act. The Appellate Authority held that a reading of section 2 (*c*) of the Act would make it clear that interruption caused by leave of any kind whether with wages or without wages should be included in the term of continuous service and that the word "actually employed" occurring in *Explanation I* to section 2 (*c*) of the Act was not the same as actually worked. The Appellate Authority further held that to attract the application of *Explanation I* under section 2 (*c*) of the Act one need not actually work for not less than 240 days in a year. In these circumstances, the petitioner has filed this petition for the issue of a writ of *certiorari* to quash the order passed by the the Appellate Authority on 21st February, 1978.

2. It is seen from paragraph 2 of the counter-affidavit that the second respondent was unauthorisedly absent for 94 days, 92 days, 78 days, 15 days, 28 days, 29 days and 44 days every year on various dates from 16th October, 1969 to 15th October, 1976. In the view of this unauthorised absence Mr. T. S. Gopalan contended thet the second respondent had not put in continuous service for each year. Consequenly he must have actually worked for at least 240 days to fall within the *Explanation I* to section 2 (*c*) of the Act and to qualify himself for gratuity. Mr. Gopalan argued that the view taken by the Appellate Authority that under the *Explanation* an employee need not actually work for 240 days to be eligible for gratuity and that it would be sufficient if the relationship of master and servant existed for 240 days, is erroneous.

3. On the other hand, Mr. Chandran, the learned counsel for the second respondent strenuously contended that it was not necessary to fall within *Explanation I* to section 2 (*c*) of the Act that an employee should have actually worked for 240 days. So long as the master and servant relationship existed for 240 days, the employee would fall under *Explanation I* to section 2 (*c*) of the Act and he would be eligible for gratuity. In this case, the learned counsel further contended that if the number of holidays, leave with wages and off days are taken into account it would be clear that the second respondent had worked for 240 days.

4. To decide the controversy between the parties it is necessary to refer to the relevant sections of the Act. Section 4 of the Act reads as follows :—

> "4 (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, ...
>
> (*a*) On his superannuation; or
>
> (*b*) On his retirement or resignation; or
>
> (*c*) On his death or disablement due to accident or disease:
>
> Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :
>
> Provided further that in the case of death of the employee gratuity payable to him shall be paid to his nominee, or if no nomination has been made, to his heirs
>
> x x x x x x
>
> (2) for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned.
>
> x x x x x x

5. Section 2 (*b*) states 'completed year of service' means continuous service for one year.

6. Section 2 (*b*) states "continuous service means uninterrupted service and includes service which is interrupted by sickness, accident, leave, lay-off, strike or a lock-out or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

Explanation I—In the case of an employee who is not in uninterrupted service for one year, he shall be deemed to be in continuous service if he has been actually employed by an employer during the twelve months immediately preceding the year for not less than

(*i*) 190 days if employed below the ground in a mine, or

(*ii*) 240 days in any other case except when he is employed in a seasonal establishment

x x x x x x

7. From the above sections it is evident that section 4 (1) creates a right in an employee to get gratuity and it enjoins an obligation on the employer to pay gratuity to an employee on the termination of his employment in one of the modes set out in the section provided the employee has rendered 'continuous service' for not less than five years'. The definition of 'continuous service', states that absence due to sickness, accident, leave, lay-off, strike or lock-out or cessation of work not due to any fault of the employee concerned will not bring about an interruption in service. In other words a service even though interrupted due to above causes will be deemed to be uninterrupted and falling within the definition of 'continuous service'. To put it differently the days during which an employee is absent for the reasons mentioned in the definition of 'continuous service' will be counted as a part of uninterrupted service. Therefore, if the service of an employee is only interrupted by any of the reasons mentioned in the main definition of 'continuous service' still the said service will be deemed to be uninterrupted and taken to be continuous service. On the other hand, if the service is interrupted by causes other than those which are mentioned in the definition the service will be deemed to be interrupted and the said service will not fall within the definition of 'continuous service'. *Explanation I* to section 2 (*c*) of the Act provides for cases where a service is interrupted by reasons other than those mentioned in the main definition of 'continuous service'. *Explanation I* creates a fiction. Under the said *Explanation* a person who is not in uninterrupted service for one year shall be deemed to be in 'continuous service' if he has been actually employed by the employer during the 12 months immediately preceding the year for not less than 190 days in case of a person employed below the ground in a mine and 240 days in any other case except when he is employed in a seasonal establishment. Under this *Explanation* even services which are not uninterrupted for a period of one year tested in the light of the definition, can be deemed by a fiction to be an uninterrupted service provided the employee has been actually employed for not less than 190 days if employed below the ground level in a mine and 240 days in any other case except in the case of a seasonal establishment.

8. In this case, as I have already stated, it is not disputed that the second respondent has been absent unauthorisedly for a number of days during all the seven years he was in the service of the petitioner. In the circumstances, it cannot be said that the second respondent has been in uninterrupted service with the petitioner. It therefore, naturally follows that he has not been in continuous service within the meaning of the main part of the definition of 'continuous service' in section 2 (*c*) of the Act.

9. Then the question arises whether the second respondent can be deemed to have been actually employed with the petitioner for 240 days within the meaning of *Explanation I* to section 2 (*c*) of the Act. The answer to this question will naturally depend on the interpretation to be given to the words

'actually employed'. While it is the case of Mr. Gopalan that to fall within *Explanation I* to section 2 (*c*) of the Act the second respondent must have actually worked for 240 days it is the contention of Mr. Chandran, that it will be sufficient if the relationship of master and servant existed for a period of 240 days. On a reading of the whole of section 2 (*c*) I am inclined to take the view that in order to fall within the *Explanation I* an employee should have actually worked for 240 days and it will not be sufficient if the relationship of master and servant subsists for 240 days. If an employee has been absent for any number of days only by reason of sickness, accident, leave, lay-off, strike or a lock-out or cessation of work not due to any fault of the employee concerned (*sic*) then his service will not be deemed to be uninterrupted and will be taken to be continuous service irrespective of the number of days, for which he has been absent in that year. However, if the employee has been absent for any reason other than the reasons mentioned in the main part of the definition, his services will not be deemed to be uninterrupted and therefore, continuous. It is to provide for cases where an employee has put in only interrupted service for a period of one year, the *Explanation I* to section 2 (*c*) of the Act has been introduced to enable him to be eligible to get gratuity notwithstanding the fact that his service was interrupted. In such cases the *Explanation* provides that the employee will be eligible for gratuity provided he has been actually employed for 240 days. Reading the main definition as well as the *Explanation* I together it is clear that the Parliament had while using the word 'actually' before the word 'employed' intended that the employee should have worked for 240 days. Otherwise, the word 'actually' could have been a surplusage. It is one of the principles of interpretation that no word in the statute should be considered to be redundant. If really the Parliament meant that an employee would be entitled to gratuity if he had been employed for 240 days in cases other than mines and for 190 days in the case of mines, there was no necessity for the Parliament to define 'Continuous service' as uninterrupted service and to have included in uninterrupted service, service interrupted by sickness, accident, leave, lay off, strike or a lock out or cessation of work not due to any fault of the employee concerned.

10. The above conclusion of mine is supported by a Bench of the Bombay High Court, in *Bombay Union Dyeing and Bleaching Mills* v. *N. T. More*[1], where a similar question arose for consideration. There an employee claimed gratuity on the basis that he was in employment for twelve years but the employer paid him gratuity only for four years and contended that for the rest of the service the employee did not actually work for 240 days in a year and that he was absenting himself without leave almost every year and that he would not be entitled to gratuity for the year during which he had not actually worked for 240 days in a year. The Labour Court which was the Controlling Authority negatived the contention of the employer and granted the claim of the employee. The Industrial Court on appeal by the employer held that the employment or being employed had to be interpreted as comprising the subsistence of relationship of employer and employee and not necessarily rendering of actual work or being on duty or performing work. It was the orders of the Labour Court and the Industrial Court that were challenged before the Bombay High Court. It was held as follows :

> "While the main part of the definition in section 2 (*c*) of the Payment of Gratuity Act, 1972, deals generally with the concept of 'continuous service' the *first Explanation* deals only with the case of an employee who is not in uninterrupted service for one year. By that *Explanation*, in the case of those who are not in uninterrupted service for one year, the legislature has introduced a fiction and by the fiction it is provided that if the employee has been actually employed by an employer within the 2 months immediatiely preceding the year for not less than 190 days if employed below the ground in mine, or 240 days in any other case except when he is employed

1. (1980) 1 L. L. N. 352 : 1980 Mah. L. J. 171.

in a seasonal establishment, then such employee shall be in continuous service. An artificial meaning has therefore, been given to the words 'continuous service' by fictionally treating an employee who is not in uninterrupted service for one year as being in continuous service provided he is actually employed for the number of days referred to in the *Explanation* ..... It is important to bear in mind that in the *Explanation* the legislature has used the words actually employed'. If it was contemplated by the *first Explanation* that it was enough that there was a subsisting contract of employment, then it was not necessary for the legislature to use the words 'actually employed' One cannot attribute redundancy to the legislature and when the legislature has deliberately used the words 'actually employed' in the context of the definition of 'continuous service' it is clear that those words contemplate that the employee who wants to take benefit of the *Explanation* must show that he had actually worked for 240 days during the period of twelve months immediately preceding the year in question Giving any other meaning for the words "actually employed" would defeat the purpose of enacting the *Explanation*. There is intrinsic evidence in the *Explanation* itself apart from the words used, that the words "actually employed' contemplate actual work or actual rendering of service. It is therefore, quite clear that for purpose of the first *Explanation* an employee must show that he has actually rendered service for the number of days specified in the *Explanation*..... For the purpose of continuous service or uninterrutped service, absence resulting only in the circumstances specified in the inclusive part of the definition could be taken into account. Absence for any other reason or on account of any other circumstances would clearly have the effect of interrupting the service and the moment such interruption of service occurs the employee would clearly be one who cannot be said to be in an uninterrupted service. Once the employee falls into the eategory of those who are not in an uminterrupted service then the only provision which may enable him to get the benefit of gratuity is *Explanation I*. *Explanation I* gives only one criterion for deciding whether a person is deemed to be in continuous service. This criterion is that he has to be actuliy employed for not less than 240 days, if he is not employed in a seasonal establishment or below the ground in a mine."

11. To sum up 'continuous service' under section 2 (*c*) of the Act means uninterrupted service for one year. Absence of an employee for reasons mentioned in the main definition of section 2 (*c*) will not cause interruption in service. If an employee is absent for any other reason or on account of any circum stances other than those mentioned in the main definition in section 2 (*c*) of the Act, he cannot be said to be in uninterrupted service. In such cases to the eligible to receive gratuity he must fulfil the conditions in *Explanation I* to section 2 (*c*) of the Act according to which he must have actually worked for not less than 240 days if he is not employed in seasonal establishment or below the ground in a mine. Tested in the light of the above principles it will be seen that th second respondent worked for 240 days and above only in one year, *i. e.*, in the year 16th October, 1974 to 15th October, 1975 In all other years he has not actually worked for 240 days as required under *Explanation I* to section 2 (*c*) of the Act. It therefore, follows that he has not been in 'continuous service' for a period of five years which is necessary to acquire eligibility for the payment of gratuity under section 4 (1) of the Act. The impugned order is therefore, quashed. The writ petition as allowed, but under the circumstances without costs.

S. J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M Ismail, CJ. and M. A. Sathar Sayeed, J.*

G. Balakrishnan ... *Appellant**

v.

The Official Assignee, Madras and another ... *Respondent.*

Negotiable Instruments Act (XXVI of 1881), section 73—Cheque presented after six months dishonoured — Claim preferred before Official Assignee — Claim rejected — Cheque ought to have been presented within reasonable time.

The insolvent drew a cheque on 8th December, 1970, but post-dated it as 15th December, 1970 and gave it to '*V*'. '*V*' discounted the cheque with the appellant on 29th December, 1970 and according to the appellant '*V*' obtained consideration from him. However, the cheque was not permitted to be presented for payment immediately at the instance of '*V*' and ultimately when the cheque was presented after a period of six months it was dishonoured. Thereafter the appellant preferred a claim before the Official Assignee who rejected it holding that the appellant was not a holder in due course. The appellant filed an appeal before the Insolvency Court and the appeal was dismissed on the ground that the cheque was not presented within a reasonable time, namely, six months. The appellant filed the present O. S. A.

Held: Having regard to the fact that the appellant was hand-in-glove with the payee in not presenting the cheque within the time allowed for the purpose and known to the mercantile practice, the appellant had lost his right to have recourse against the drawer. Section 73 of the Negotiable Instruments Act, having regard to the language in which it is couched, does not permit the contention that where the drawer is not shown to have suffered any damage he is not absolved under that section from the obligation if the cheque is not presented within a reasonable time. [*Para.* 3.]

On appeal from the order of Ramaprasada Rao, J., dated 1st July, 1977 in Appeal No. 274 of 1977 in I. P. No. 94 of 1972.

R. Krishnaswami, for Appellant.

The Order of the Court was made by

Ismail, CJ.—This is an appeal against the order of Ramaprasada Rao, J., as he then was, dated 1st July, 1977. The facts are not in dispute. The insolvent drew a cheque on 8th December, 1970, but post-dated it as 15th December, 1970 and gave it to one Venkateswara Movies with whom he had transactions in film trade. Venkateswara Movies (mistakenly referred to in the order as 'drawee') discounted the cheque with the appellant, on 29th December, 1970 and according to the appellant, Venkateswara Movies obtained consideration from him. However, the appellant was not permitted to present the cheque for payment from time to time at the instance of Venkateswara Movies and ultimately when the cheque was presented after a period of six months, it was dishonoured. It is thereafter the appellant preferred a claim before the Official Assignee. The Official Assignee rejected the claim holding that the appellant was not a holder in due course and the cheque was not supported by consideration. Against this order of the Official Assignee, an appeal was preferred before the learned Judge in Appln. No. 274 of 1977. The learned Judge, while disagreeing with the Official Assignee on the two points mentioned above. still upheld the rejection of appellant's claim on the ground that the appellant not having presented the cheque within a reasonable time, namely, six months, according to the usual custom

*O. S. A. No. 30 of 1980. *3rd September*, 1980.

in mercantile practice, having been hand-in-glove with the payee was not entitled to claim the amount in insolvency though he could have a cause of action against the payee. It is the correctness of this conclusion that is challenged before us.

2. The learned Judge, for holding that the appellant cannot make a claim against the insolvent, relied on section 84 of the Negotiable Instruments Act, dealing with the consequence when a cheque was not duly presented within the reasonable time. However, what the learned counsel for the appellant contended before us is that under section 73 of the Act a drawer is not absolved of his liability because the cheque is not presented within a reasonable time. Section 73 read as follows—

"A cheque must in order to charge any person except the drawer be presented within a reasonable time after delivery thereof by such person.

Section 83 reads as follows :

"1. Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

2. In determining as to what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

3. The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him."

The learned counsel for the appellant contends that section 84 appiles only when the drawer has suffered damage, and in the present case, there was no proof of damage. Consequently, the learned counsel contends that under section 73 the drawer is not absolved of the obligation if the cheque is not presented within a reasonable time.

3. In our opinion section 73, having regard to the language in which it is couched, does not permit of such a contention being advanced. In fact, we asked the learned counsel to tell us whether there is any decision to cover the case as we have on hand. The learned counsel respresented to the Court that he was solely relying upon the language of section 73, and nothing more. We are of the opinion that in the absence of any further light thrown, having regard to the fact that the appellant was hand-in-glove with the payee in not presenting the cheque within the time allowed for the purpose and known to the mercantile practice, the appellant has lost his right to have recourse against the drawer. Consequently, we see no reason to interfere with the order of the learned Judge and dismiss the appeal.

S. J. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

S. Perumal Reddiar ... *Appellant**

v.

Bank of Baroda by its power of Attorney Kaliprasad Thakkur, 160, A/2, Mount Road, Madras-2, and others .... *Respondents.*

Indian Contract Act (IX of 1872), sections 133 139—Banker and customer — Document of guarantee — Blank forms signed by guarantor — Forms filled up after signing when they were in the custody of the promisee — Amounts to material alteration — Guarantor surety discharged.

The surety, it is often said, is a favoured debtor. An unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract, avoids the contract against the person otherwise liable upon it. In a printed form of guarantee, if the signature of the guarantor is obtained prior to the filling up of the blanks relating to material particulars of the contract, the said filling up of the blank spaces in the printed form of guarantee amounts to material alteration especially when the said deed relating to the contract of guarantee is in the possession of the promisee or his agent, and discharges the contract of guarantee. In the document of guarantee, if the blank spaces relating to the amount for which the person stands as guarantor, the date of the instrument, amount for which the person stands as a surety and the rate of interest for which the amount had been advanced, are filled up, such filling up would amount to substantial alteration, which are to the detriment of the surety and the said material alterations discharge the surety from liability. The said alterations are certainly to the disadvantage of the surety. [*Para.* 41.]

The tone rule applicable to the contract of guarantee in that if there is any agreement between the principals with reference to the contract of guarantee, the surety ought to be consulted. If the alteration with the disadvantage of the surety, or its unsubstantial nature is not seep-evident, the surety can claim to be discharged. The contract of the surety should not be altered without his consent. [*Para.* 43.]

Cases referred to:

Lakshmammal v. *Narasimharaghava Aiyangar* (1915) I. L. R. 38 Mad. 746 : 25 M. L. J. 572; *Verco Private Ltd.* v. *Newandram Naraindas,* (1973) 2 M. L. J. 423: 86 L. W. 435: A. I. R. 1974 Mad. 4; *Seth Tulsidoss Lalchand* v. *G. Rajagopal,* (1967) 2 M. L. J. 66: 80 L.W. 244; *M. S. Anirudhan* v. *Dhamcos Bank Ltd,* (1964) 1 S. C. J. 495: (1964) 1 An. W. R. (S. C.) 137 : (1964) 1 M. L. J. (S. C.) 137: A. I. R. 1963 S. C. 746; *Nathu Lal* v. *Mst. Gomit Kuar,* (1941) 1 M. L. J. 204: 67 I. A. 318: 52 L. W. 313: A. I. R. 1940 P. C. 160: 190 I. C. 135; *Adsetts* v. *Hives,* 55 E. R. 226; *Doe* v. *Bingham,* 106 E. R. 1082; *Kunhi Sankaran Nambiar* v. *Narayanan Tirumunpu,* (1920) I. L. R. 43 Mad. 405: 38 M. L. J. 251: 11 L. W. 192; *Bishop of Credition* v. *Bishop of Exeter,* (1904 to 1907) All E. R. 552; *Paget* v. *Paget,* 21 E. R. 701.

Appeal against the decree, dated 14th February, 1975 of the Court of the Subordinate Judge, Kancheepuram in Original Suit No. 99 of 1973.

T. S. Subramaniam and *K. Venkataraman,* for Appellant.

V. S. Subramanian and *Ramalinga Reddy,* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the third defendant S. Perumal Reddiar against the judgment and decree, dated 14th February, 1973, in O. S. No. 99 of 1973 on the file of the Court of the learned Subordinate Judge, Kancheepuram, decreeing the suit with costs as prayed for. The trial Court held that the

*A. S. No. 20 of 1976. *7th March,* 1980.

2nd defendant will be proceeded against after the remedies are exhausted against the first defendant.

2. The suit is on a promissory note. The case of the plaintiff, Bank of Baroda by its power of attorney agent Kaliprasad Thakur, before the trial Court is that the plaintiff is a banking institution constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, with its branch, among other places at Mangadu and that the suit is instituted by the power of attorney agent Kaliprasad Thakur, the Regional Manager, Southern Region, Mount Road, Madras-2. The 1st defendant K. L. Sundaram Reddiar, the 2nd defendant A. Sundaram Reddiar and the 3rd defendant S. Perumal Reddiar are residing at Kaliampatti village, Uthiramerur Taluk, Chingleput District. The plaintiff, Bank of Baroda at its Mangadu branch afforded to the 1st defendant on 15th March, 1973, crop loan facility for Rs. 15,000 for agricultural purposes on the hypothecation of present and future crops on the 1st defendant's lands bearing Chitta Nos. 39, 377, 281, 130 and 99, of an extent of 43.57 acres of dry and wet lands in No. 219, Kaliampatti village, Uthiramerur Taluk, Chingleput District. The 1st defendant promised to pay the amount on demand with interest at four per cent. over the Reserve Bank of India rate with a minimum of ten per cent. per annum with quarterly rests. On 15th March, 1973, the 1st defendant availed himself of the loan and on the same day, as security for the advance, the 1st defendant executed a demand promissory note and a letter of continuing security. An agreement of hypothecation-*cum*-guarantee was duly executed by the 1st defendant as principal-debtor and 2nd and 3rd defendants as guarantors, the latter guaranteeing the due repayment of the loan and that their liability is co-extensive with that of the principal-debtor, the 1st defendant. The 1st defendant had not paid any amount towards the advance in spite of repeated demands made by the plaintiff. A notice of demand was issued on 2nd July, 1973. Though the agricultural operation for the season ending May, 1973, was completed the 1st defendant has not paid the amount as promised and when demanded, gave evasive reply. There is now due and payable by the defendants a sum of Rs. 15,476.35 as on 28th June, 1973 and further interest of Rs. 51-30 upto date of plaint, in all aggregating to Rs. 15,527.65. Defendants 2 and 3 joined the 1st defendant in executing the hypothecation-*cum*-guarantee as guarantors guaranteeing jointly and severally for the due repayment and discharge of the loan by the 1st defendant.

3. In his written statement, the 1st defendant K. L. Sundara Reddiar, has *inter alia* contended that defendants 1 to 3 and one Ramakrishna Reddiar in partnership proposed to do toddy shop business under licence from the State and that they approached the plaintiff-bank for accommodating them with a loan for one lakh of rupees on a collateral security of lands belonging to the 3rd defendant, Perumal Reddiar. The plaintiff-bank accepted the title deeds of the property tendered as security by way of equitable mortgage. It was learnt that toddy shops could be taken under credit guarantee scheme. Subsequently, the Area Manager of the plaintiff-bank Mr. Narasimhan, represented to the defendants that the loan would not be granted for the toddy shop business but on the security of the title deeds offered by S. Perumal Reddiar, small agricultural loans could be given in the name of diverse parties. Accordingly, the bank granted a loan of Rs. 15,000 to the 1st defendant, Rs. 1,430.87 to the 2nd defendant, Rs. 15,000 to the 3rd defendant, Rs. 8,000 to Ayyaswami Reddiar, Rs. 5,000 to Ramalinga Reddiar, Rs. 8,000 to Sivarama Reddiar, Rs. 10,000 to K. M. Venkataswami Reddiar and Rs. 2,500 to each of V. Govindaswamy Reddiar, Krishna Reddiar, Varadharajan and Kuppu Reddiar. The sum of Rs. 10,000 sanctioned in favour of the four persons at Rs. 2,500 each was taken by the said Narasimhan for his own purposes. The said Narasimhan has so far failed to pay back the money into the bank and that amount with interest thereon is included in the suit claim. If he had repaid that sum of Rs. 10,000, that there would have been very

little left in the suit claim against the defendants. The suit filed by the plaintiff-bank without giving credit to that sum of Rs. 10,000 is *mala fide*. The suit is bad for non-joinner of parties.

4. The second defendant A. Sundara Reddiar in his written statement has contended that he puts the plaintiff-bank to strict proof of the execution of the suit promissory note by the 1st defendant and payment of consideration. In any event, as he is only a guarantor, he may be made liable for the suit claim only after the plaintiff exhausts its remedy against the 1st defendant.

5. The 3rd defendant S. Perumal Reddiar in his written statement has contended that he is not the guarantor for the first defendant, that he did not execute any guarantee agreement in favour of the plaintiff-bank and that he never agreed to stand guarantee and never agreed to be liable for the alleged loan of Rs. 15,000 advanced to the 1st defendant. He is not liable jointly or severally and did not guarantee the repayment of the amount due under the promissory note. He is not aware of the loan to the 1st defendant. He never signed any guarantee agreement He was an inpatient in the Stanley Hospital at Madras for Gastric trouble from 6th March, 1973 and was discharged from the hospital on 29th March, 1973. He was bed-ridden in Madras Stanley Hospital and could not and did not execute any guarantee agreement as alleged in the plaint. One Radhakrishnan and an Honorary Magistrate came and took the signature of this defendant at Madras Stanley Hospital stating it was a power-of-attorney. Beyond this, nothing else happened. This defendant is not liable for the suit claim. The suit has to be dismissed with his costs.

6. The plaintiff in its reply statement, calling it as rejoinder, has denied that there was any partnership between the defendants and one Ramakrishna Reddiar or they made an application to the plaintiff-bank for a loan of one lakh of rupees. There was a proposal offering the lands of the 3rd defendant as security for the individual advances to be made to the defendants and four others set out in paragraph 3 of the written statement of the 1st defendant. But, as the 3rd defendant fell ill and was admitted in the hospital, no deposit of title deeds was made by him. The advances to parties 7 to 10 were on 10th, 11th and 12th April, 1973 by the agent under his powers and party No. 11-A. Sundaram was given an over-draft and a sum of Rs.1,430.87 is due from him since February, 1973. The allegation that all the 11 loans were covered by a common security is false to the knowledge of the defendants and so, the contention that the suit is bad for non-joinder of parties also is not tenable. The plaintiff is not aware of the financial transactions between the Assistant Area Manager, Narasimhan and the defendants nor is it concerned about the same. The suit should therefore be decreed as prayed for.

7. The 1st defendant remained *ex parte* during the trial though he filed a written statement.

8. On the above pleadings, the following issues were framed by the trial Court.

1. Whether the suit is bad for non-joinder of the persons mentioned in paragraph 3 of the written statement and hence not maintainable in law?

2. Whether the defendants 2 and 3 are gurantors and are liable as such?

3. To what relief?

9. On behalf of the plaintiff, P. W. No. 1 V. Srinivasan and P. W. 2 Krishnaswami were examined. Exhibits A-1 to A-6 were filed on behalf of the plaintiff. The 3rd defendant Perumal Reddiar, who is the appellant herein, had examined himself as D. W. 1. On behalf of the defendants Exhibit B-1, discharged certificate issued by ths Government Stanley Hospital, Madras, was filed.

10. Under issue No. 1, the trial Court held that the suit is not bad for non-joinder of the other parties to it. Under Issue No. 2, the trial Court held that the 2nd defendant has prayed in his written statement that, he, as a guarantor, may be proceeded for the said

loan after the 1st defendant had been proceeded against and that this is a reasonable request, which can be considered in equity. It also held under that issue that the claim of the 3rd defendant that his signature was taken in the guarantee agreement Exhibit A-3 just ten minutes before he was taken to the operation theatre, cannot be true, that the 2nd defendant cannot escape his liability on the guarantee he has given to the plaintiff bank for the 1st defendant on the ground that Exhibit A-3 was signed by him on 28th March, 1973 or 29th March, 1973 instead of 15th March, 1973 and that the blank spaces in the printed Tamil form of guarantee, Exhibit A-3 were filled up subsequently. The trial Court also held that defendants 2 and 3 are guarantors and are liable as such. Under issue No. 3 the trial Court decreed the suit with costs as prayed for.

11. Aggrieved by the above decision of the trial Court, the 3rd defendant S. Perumal Reddiar has come forward with this appeal *inter alia* contending that he was admitted in the Stanley Hospital, Madras, on 6th March, 1973 and was operated for duodenal ulcer on the date when the guarantee letter was said to have been executed just before he was taken to the operation theatre and in the circumstances in which be was placed, he could not have signed any paper with the knowledge of its contents. It is also contended that his signature was taken in Exhibit A-3 on the representation that it was a power of attorney. It is further contended that P. W. 2 has admitted that the appellant executed the guarantee letter on 29th March, 1973 in his house and as such, the case of the plaintiff cannot be accepted. It is submitted on behalf of the appellant that he did not sign any guarantee letter but only some blank form on the representation that it was a power-of-attorney. It is also pointed out in this regard that both P. Ws. No. 1 and 2 have deposed that Exhibit A-3 was not filled up when the appellant signed it. It is contended by Mr. T. S. Subramaniam, the learned counsel for the appellant that P. W. 2 has not followed the procedure in obtaining the signature of the appellant and as such, the guarantee letter, Exhibit A-3 cannot be held as duly executed by the appellant and therefore, there was no due execution of guarantee letter by the appellant herein. In other words, it is contended that inasmuch as the case of the plaintiff, as deposed by P. W. 2, is that the blank spaces in Exhibit A-3 letter of guarantee were filled up after the signature of the appellant was obtained in it, the appellant had no knowledge about the actual sum for which he was standing as a guarantor and therefore, he is not liable under Exhibit A-3 the letter of guarantee.

12. On the other hand, it is contended on behalf of the plaintiff/1st respondent-bank by Mr. V. S. Subramaniam, that inasmuch as the appellant has admitted in his evidence as D. W. 1 that he knew English well and that only after knowing that Exhibit A-3 is a letter of guarantee, he has signed it, it cannot be held that he was having no knowledge that he was signing a letter of guarantee. He contends that Exhibit A-3 is a printed form in Tamil and that it is not the case of the 3rd defendant-appellant that he does not know Tamil. The learned counsel for the 1st respondent-bank submits that merely on the ground that P. W. 2 admits, that the blank spaces in the printed form were subsequently filled up, it connot be held that the appellant is not liable under the letter of guarantee. It is also contended on behalf of the 1st respondent that when the appellant knew that he was putting his signature in Exhibit A-3 as a surety for the 1st defendant, it is not now open to him to say that he is not liable under Exhibit A-3 and in this regard he relies on the evidence of P. W. 2, who states in his cross-examination that at the time when he obtained the signature of the appellant in Exhibit A-3, the appellant knew that he was standing as a surety for the 1st defendant. The point for consideration in this appeal is: Whether the appellant is liable for the suit claim as a guarantor?

13. The appellant as D. W. No. 1 has stated in his evidence that on 6th March, 1973 he was admitted for operation in the Stanley Hospital, Madras, and that he was discharged from the hospital only on 29th March, 1973. Exhibit B-1 is the discharge certificate

issued by the Stanley Hospital. Out-patient Department, which shows that the appellant was operated on 14th March, 1973 for duodenal ulcer and discharged from the hospital on 29th March, 1973. D. W. 1 further states in his evidence that before he was taken inside the operation theatre, his signature was obtained by one Radhakrishnan near his bed. According to D. W. 1 there were two persons present at that time and they informed him that the 1st defendant asked them to get his signature. The appellant further states that accordingly he signed the said document. Within ten minutes, after he thus signed the said document, he was taken inside the operation theatre. According to D. W. No. 1, he did not execute any agreement in favour of the 1st defendant. He admits that a notice was issued to him on behalf of the bank and that he did not give any reply.

14. In his cross-examination, the appellant as D. W. 1 states that the 1st defendant is his close relation and that the 1st defendant has transactions with the Mangadu Branch of the plaintiff-bank. D. W. 1 is acquainted with both P. Ws. 1 and 2. D. W. 1 further states that he did not obtain any loan from the Mangadu branch of the plaintiff-bank. D. W. 1 in his cross-examination admits that he had signed both in the bottom of the first page as well as on the reverse side of Exhibit A-3. Though D. W. No. 1 has stated in his cross-examination that the said Radhakrishnan is known to him, he has not examined him as a witness in support of his case. He has not also examined the Honorary Magistrate, who according to him, had accompanied the said Radhakrishnan. According to D. W. 1, it was the said Radhakrishnan, who obtained his signature, but he does not know in what documents he had thus obtained his signature. D. W. 1 further states in his cross-examination that he was discharged from the Stanley Hospital on the morning of 29th March, 1973. He would state that he did not go to the house of P. W. 2. He has denied the suggestion that he had gone to the house of P. W. 2 and signed in Exhibit A-3 and other documents. Though D. W. No. 1 has stated that the 1st and 2nd defendants have signed above his signature in the second page of Exhibit A-3, he would state that he does not remember whether he had seen them signing the same.

> "Ex. A-3 யின் பின் பக்கத்தில் என் கையெழுத்துக்கு மேல் பிரதிவாதிகள் 2-1 பேர்கள் கையெழுத்திட்டார்கள். அதைப் பார்த்தேனோ என்று ஞாபகம் இல்லை".

15. P. W. 1 is the Manager of the Mangadu branch of the plaintiff bank from 30th April, 1973. In his evidence he states that the 1st defendant had applied for loan from the bank and that Exhibit A-1 is the application form given by him. According to P. W. 1, Exhibits A-1 was given to the bank on 13th March, 1973. P. W. 1 further states in his evidence that Rs. 15,000 was sanctioned by the bank to the 1st defendant and the 1st defendant had also executed a promissory note. Exhibits A-2 is the promissory note executed by the 1st defendant in favour of the plaintiff-bank for Rs. 15,000 and it is dated 15th March, 1973. Defendants 2 and 3 have executed Exhibit A-3 letter of guarantee. Exhibit A-4 is the copy of the ledger account relating to the 1st defendant. Exhibit A-5 is the letter of continuing security executed by the 1st defendant to the plaintiff-bank. Exhibit A-6 is the copy of the notice, dated 2nd July, 1973, issued by the plaintiff-bank to the defendants. During that time, one Krishnan was the manager of the bank. According to P. W. 1, after he became the manager he asked the defendants to repay the amount and at that time, the appellant told him that P. W. 1 could first make a demand with the 1st defendant and that if he fails to repay, he (appellant) would pay the amount. According to P. W. 1, at that time, the appellant herein told him that as he was in the hospital on 15th March, 1973, after his discharge from the hospital, he went to the house of the agent and signed Exhibit A-3 in his house in order to avoid any trouble for the agent. P. W. 1 states that the appellant herein did not sign in Exhibit A-3 in the hospital.

16. In his cross-examination P. W. 1 states that in Exhibits A-1, the signatures of the persons who intend standing as sureties ought to have been obtained, but the signatures of the sureties were not obtained in it. He also states that in Exhibit A-1, the date is not mentioned. According to him, only when the person who gets the loan from the bank as well as two other persons who stand as sureties for the said person who has applied for the loan in the bank, come together and ask the loan from the bank, the loan would be given by the bank. He also states that it is only during that time, the letter of guarantee is also obtained. He cannot say whether in the instant case the said procedure was followed by the bank authorities. It is admitted by P. W. 1 in his cross-examination that the blank spaces available as against the column relating to the persons who are standing as sureties for the 1st defendant remained unfilled and that the signatures of the sureties have also not been obtained in Exhibit A-1. P. W. 1 specifically states in his cross-examination that it was he who filled up the blank spaces in the first page of Exhibit A-3 subsequent to 30th April, 1973 and that at the time when he filled the blank spaces, the signatures of the three defendants alone were found in Exhibit A-3. He could not say the exact date when he thus filled the blank spaces in Exhibit A-3. He could not say whether the signatures of the defendants in Exhibit A-3 were obtained on 15th March, 1973. He frankly admitted in his cross-examination that as the loan was disbursed on 15th March, 1973, he had filled up the concerned blank space in Exhibit A-3 with the date 15th March, 1973.

17. P. W. 2 Krishnaswami was the Manager of the Mangadu branch of the plaintiff-bank from 4th October, 1971 to 30th April, 1973. He is acquainted with the 2nd and 3rd defendants. According to P. W. 2, the 1st defendant had signed Exhibit A-3, letter of guarantee, even on the date on which the amount was disbursed to him. At that time, the appellant was an in-patient in the hospital. The 1st defendant told him that the appellant would sign in Exhibit A-3 after he was discharged from the hospital. The specific evidence of P. W. 2 is that on 28th March, 1973 or 29th March, 1973, the appellant came to his house and signed Exhibit A-3. P. W. 2 was informed by the 1st defendant through phone that the appellant was discharged from the hospital. P. W. 2 had brought the relevant papers to his house. The 1st and the 3rd defendants came to his house. At that time, the appellant signed in Exhibit A-3. P. W. 2 has stated that the signature of the appellant was not obtained in Exhibit A-3 on the representation that the said document is a power-of-attorney, when he was in the hospital. Even in his cross-examination P. W. 2 states that the signature of the appellant was obtained in Exhibit A-3 only after he was discharged from the Stanley Hospital. P. W. 2 also states in his cross-examination that the signatures of the 1st and 2nd defendants were obtained in Exhibit A-3 even on the date on which the loan was disbursed. According to P. W. 2, due to pressure of work, the signature of the appellant was not obtained in Exhibits A-3. P. W. 2 also admits in his cross-examination that without filling up the blank spaces in Exhibit A-3, the signature of the appellant was obtained in it and that the blank spaces were filled up subsequently.

18. On a careful consideration of the entire evidence available on record, both oral and documentary, I have no hesitation to reject the case of the appellant that the signature in Exhibit A-3 was obtained from him in the Stanley Hospital just about ten minutes prior to himself being taken inside the operation theatre on the representation that the same was only a power-of-attorney. On the other hand, I am satisfied that the evidence let in through P. Ws. 1 and 2 clearly shows that on 15th March, 1973 when the loan was disbursed to the 1st defendant, the signature in Exhibit A-3 was not obtained from the appellant, but the signatures of the 1st and 2nd defendant alone were obtained in it. Their evidence further shows that the appellant went to the house of P. W. 2 and signed in Exhibit A-3 on 29th March, 1973

P. W. 1 specifically admits in his evidence that the blank spaces in the tamil printed form Exhibit A-3 were filled up by him subsequent to 30th April, 1973.

19. Exhibit A-3 is the printed hypothecation agreement for crop-cum-guaranteed (பயிர்களின் அடமானம் மற்றும் உத்திரவாத ஒப்பந்தம்). Apart from the words 'Bank of Baroda' and "Hypothecation agreement for crop-*cum*-guarantee" being printed in English, the other contents of both the pages of Exhibit A-3 are in Tamil. It contains eight clauses apart from the preamble. The blank spaces in the preamble portion relating to the date of execution, name of the principal debtor and the sureties the place where the bank branch is situated, the Survey Number of the lands or the place where the said lands are situate, the period of the crop season, the principal amount advanced aad the rate of interest are left in the first page and the other matters are printed in Tamil. There are blank spaces in the fourth clause as well as eighth clause of page 2 of Exhibit A-3. They remain unfilled. The blank spaces filled up in the first page of Exhibit A-3, admittedly by P. W. 1 subsequent to 30th April, 1973, are with respect to the execution of Exhibits A-3, *i. e.*, 15th March, 1973. the name of the principal-debtor K. L. Sundaram, the names of the sureties A. Sundaram and Perumal Reddiar (2nd and 3rd defendant herein), the place where the branch of the bank is situated, *viz.*, Mangadu, the place where the lands of the 1st defendant are situated, *viz.*, Uthiramerur 5.42 and 6.39 acres in S. No. 246, the period in the season, *viz*, March to August, and the amount taken as loan, *viz.*, Rs. 15,000, and they have been filled up without the knowledge and behind the back of the appellant. Similarly, the blank spaces in clause 1 relating to the amount advanced to the 1st defendant, *viz*, Rs. 15,000, the branch where the bank is situated, *viz.*, Mangadu and also the amount for which the guarantee has been given, *viz.*, Rs. 15,000 as well as the rate of interest, *viz*, at 10 per cent. per year. have been filled up subsequent to 30th April, 1973 by P. W. 1.

20. It is contended by Mr. V. S. Subramaniam, the learned counsel for the 1st respondent-bank, that the filling up of the blank spaces by P. W. 1 subsequent to 30th April, 1973, *i. e.*, after obtaining the signature of the appellant, cannot relieve the appellant from his liability under Exhibit A-3, the letter of guarantee, because in Clause 12 of Exhibit A-3 it is mentioned that persons who stand as surety are liable jointly and severally to the bank for the due repayment of the loan obtained by the principal debtor. On the other hand, Mr. T. S. Subramaniam, the learned counsel for the appellant contends that the introduction by way of filling up the blank spaces in Exhibit A-3 relating to the date of execution, name of the principal-debtor, names of the sureties, the description of the land for which the loan is advanced, the period of the season for which the loan is advanced, the specific amount advanced as loan aud the rate of interest, amount to material alteration and as such Exhibit A-3, the deed of contract, is discharged. In support of his contention, the learned counsel for the appellant refers to the following passage in Principles of the English Law of Contract by Sir William R. Anson, Twenty-second Edition at page 482, which runs as follows :—

> "If a deed or contract in writing is altered by addition or erasure, it is discharged, except as against a party making or assenting to the alteration, for 'no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected'."

This principle is subject to the following rules :

> (*a*) The alteration must be made deliberately by the promisee or by one acting with his consent ; but there is a supposed rule of law that even an alteration by a stranger while the instrument is in the custody of the promisee will have the same effect. This responsibility for the acts of officious burglars cannot be supported.

(*b*) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(*c*) The alteration must be made in a material part. What amounts to a material alteration necessarily depends upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration, which does not touch the contractual rights set forth in it.

21. The learned counsel for the appellant also refers to the following passage in Chitty on Contracts, Twenty Third Edition, Volume II, 1694 :

"*Altering the terms of guarantee* : If, while the instrument of guarantee is in the hands of the party to whom it was given, it is altered in any material particular without the knowledge or consent of the surety, it will become void and the surety will be discharged."

22. The learned counsel for the appellant relies on the decision in *Lakshmammal* v. *Narasimharaghava Aiyangar*[1], for the following proposition :

"An alteration in a document which has the effect of enabling the payee to sue on the document in a Court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document.

Altering a negotiable instrument by causing the words 'or order' to disappear and making it non-negotiable is a material alteration, under ordinary law and also under section 87 of the Negotiable Instruments Act (XXVI of 1861). The facts that the payee eventually filed the suit in another Court different from the one intended at the time of the alteration and that it was not necessary for him to rely on the altered state of document to enable him to succeed therein do not make the alteration any the less material.'

1. (1915) I. L. R. 38 Mad. 746 : 25 M. L. J. 572.

23. The learned counsel for the appellant refers to the decision in *Verco Private Ltd., Padi* v. *Newandram Naraindas*[1] for the following proposition :—

"The insertion of the rate of interest by the promisee in a promissory note after its execution, amounted to material alteration as to render the promissory note unenforceable under section 87 of the Negotiable Instruments Act. The plaintiff, as P. W. 1 had not stated in his evidence that there had been a common intention between the parties to pay interest at the rate mentioned in it and in order to give effect to that intention, he inserted the figure 'regarding thereto' and the word 'Month'. Therefore, the last portion of section 87 of the Act has no application to the circumstances of this case."

24. The learned counsel for the appellant refers to the decision in *Seth Tulsidoss Lalchand* v. *G. Rajagopal*[2], for the following proposition :

"Even though section 80 of the Negotiable Instruments Act provides that where a promissory note does not express the rate of interest payable thereon, six per cent. interest shall be payable, any alteration of the instrument by inserting the rate of interest would amount to material alteration. Hence, where in a promissory note executed the rate of interest was left blank and it was filled up later, it will be a material alteration invalidating the instrument. A promissory note which does not mention the rate of interest cannot be said to be an incomplete instrument enabling the promisee to fill up the same so as to complete the instrument within the meaning of section 20 of the Act."

25. In support of his contention, the learned counsel for the appellant also refers to the provisions under sections 133 and 139

1. (1973) 86 L. W. 435 : (1973) 2 M. L. J. 92 : A. I. R. 1974 Mad. 4.
2. (1967) 2 M. L. J. 66: 80 L. W. 244.

of the Indian Contract Act (IX of 1872). Section 133 of the Indian Contract Act reads as follows :

> "Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance."

Section 139 of the Indian Contract Act reads as follows :

> "If the creditor does (*sic*) any act which is inconsistent with the rights of the surety, or omits to do any act which the duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

26. Referring to the provisions under the above sections, the learned counsel for the appellant submits that material alterations have been made in the contents of Exhibit A-3, when it was in the possession of the 1st respondent-bank. Therefore, he contends that even if the evidence adduced through P. W. 2 that the 1st defendant accompanied the appellant when he had been to the house of P. W. 2 to sign Exhibit A-3 is true, inasmuch as it is the categorical admission on the part of P. W. 1 that it is he who filled up the material particulars in the blank spaces in Exhibit A-3 subsequent to 30th April, 1973, and also his admission that he did not remember the date on which he filled up the blank spaces with particulars his contention that the appellant is discharged by the contract under Exhibit A–3 has to be upheld.

27. The learned counsel for the appellant vehemently argues that the filling up of the blanks relating to the material particulars in a contract of guarantee, *viz.*, Exhibit A-3, behind the back of the appellant cannot under any circumstance be held to be immaterial and they do not vitiate the contract. He further submits that it is not the case of the plaintiff-1st respondent itself that it was informed by P. W. No. 2 at the time when he had obtained the signature of the appellant in P. W. 2's house that the blank spaces would be filled subsequently with respect to the loan advanced to the 1st defendant or that the appellant was informed at that time about the principal amount advanced to the 1st defendant and also the rate of interest on the sum thus advanced. He also points out that inasmuch as the application form Exhibit A-1 does not contain the name of the appellant as a surety and inasmuch as it does not also contain the signature of the appellant as a surety, it cannot be held that the appellant had signed as a surety in Exhibit A-3 for the 1st defendant. We have already seen that Exhibit A-1 does not contain the other names of the persons who intended to stand as sureties for the 1st defendant or the signature of the appellant in the column intended for the signature of the sureties. It is also relevant in this connection to note that the 1st defendant has applied for a loan of Rs. 17,400. It is not in evidence that at any point of time the appellant was made known by the 1st respondent-bank about the loan applied for by the 1st defendant or about the amount that was sanctioned and disbursed to the 1st defendant. Therefore, it cannot be held on the basis of the evidence of P. W. 2 that the 1st defendant accompained the appellant at the time the latter signed Exhibit A-3 and it cannot be presumed that he knew about the particulars which were subsequently filled up in the blank spaces in Exhibit A-3 by P. W. 1 long after the signature of the appellant was obtained in it.

28. On the other hand, the learned counsel for the 1st respondent-bank Mr. V. S. Subramaniam, contends that filling up of the blanks relating to the particulars of the contract of guarantee in a deed does not amount to material alteration and the said contrat of guarantee cannot be held to be void and unenforceable. He relies on the following passage in Chitty on Contracts, General Principles, Twenty third Edition, Volume 1394 :

> "*Immaterial alteration* : An instrument is not discharged by an immaterial alteration.

that is to say, one which does not alter the legal effect of the instrument or impose a greater liability on the promisor. Thus, the addition, without the assent of the maker, of the words 'on demand' to a promissory note did not vitiate the instrument since the alteration only expressed the legal effect of the note as originally drawn. But the alteration in a charterparty of the time of sailing has been held to be material as it altered its legal effect".

Regarding the point on material alteration, the learned counsel for the 1st respondent-bank relies on the following passage in the same volume, at 1394 :

"*Material alteration* :—If a promisee deliberately makes a material alteration in a speciality or other instrument containing words of contract without the consent of the promissor, this will discharge the promisor from all liability thereon, even though the original words of the instrument are still legible. The principle which lies behind this rule has been said to be that no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected." The promisor is therefore not discharged if the alteration is made by accident or by mistake".

30. Mr. V. S. Subramaniam, the learned counsel for the 1st respondent-bank also relies upon the following passage in Mulla's on Indian Contract and Specific Relief Act, Ninth Edition at page 625 :

"An unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract, avoids the contract against the person otherwise liable upon it. The alteration even if made by a stranger without the knowledge of the promisee or his agent while the contract document is in possession of the promisee or his agent, also discharges the contract but if it is altered by a stranger while the document was not in the custody of the promisee or his agent, the promisor is not discharged. If a guarantor entrusts a letter of guarantee to the principal-debtor and the latter makes an alteration without the assent of the guarantor, then the guarantor is liable because it is due to the act of the principal-debtor and what the principal-debtor does will estop the guarantor from pleading want of authority".

31. The learned counsel for the 1st respondent-bank also refers to the decision in *M. S. Anirudhan* v. *Thamco's Bank Ltd.*[1], for the proposition that the law now accepts that unsubstantial alterations, which are to the benefit of the surety, do not discharge the surety from liability. If the alteration is to the disadvantage of the surety or its unsubstanial nature is not self-evident, the surety can claim to be discharged and the Court will not enquire whether it in fact harmed the surety. In *M. S. Anirudhan* v. *Thamco's Bank Ltd.*[1], a guarantor stood surety for an overdraft allowed by a bank. The bank gave a blank guarantee form to the principal-debtor, who filled it up by stating the maximum debt guaranteed to be Re. 25,000/-. The bank was not prepared to accept the guarantee or give accommodation for more than Rs. 20,000/-. The principal debtor made an alteration reducing the sum to Rs. 20,000/- and gave the document to the bank. In a suit against the principal and the surety, the surety pleaded discharge of liability on the basis of the alteration. The Supreme Court, by a majority, held that the surety was not discharged. In the case, the bank sued upon the letter of guarantee and the contention raised by the surety was that there was a material alteration of the instrument of guarantee and as such, he was absolved of all liability on it. It was held, as already seen, that the avoidance of contract by material alteration was inapplicable as the document was not altered while in possession of the bank or its agent but was altered by the principal debtor. who was at the time acting as the

1 (1964) 1 An. W.R. (S.C.) 137 : (1964) 1 S.C.J. 495 : (1964) 1 M. L. J. (S. C.) 137 : A. I. R. 1963 S. C. 746.

agent of the surety. In the instant case, the alteration has been made in Exhibit A-3 while it was in the custody of the bank, by P. W. 1, the then manager of Mangadu branch of the plaintiff-bank. The signature of the appellant alone was obtained by P. W. 2. At the time when the signature of the appellant was obtained in Exhibit A-3 it is the specific evidence of P. W. 2, the then manager of the plaintiff-bank, that the blank spaces in the first page of Exhibit A-3 were remaining blank and that they were unfilled. It admits of no doubt that the subsequent filling up of the blanks in the first page of Exhibits A-3 amounts to alteration of the instrument while in the custody of the bank, especially when it is frankly admitted that those filling up of the blank spaces in Exhibit A-3 were made after the signature in it was obtained from the appellant.

32. In *Anirudhan* v. *Thamco's Bank Ltd*[1]., the document was altered while it was in possession of the principal-debtor. In the intant case, Exhibit A 3 was altered while it was in possession of the bank and it was altered by P. W. 1, who was at that time acting as the agent of the plaintiff-bank at Mangadu. It has not been established in the instant case by the plaintiff-1st respondent that the said intention had been to carry out the intention of the parties. When the material particulars such as the amount for which the appellant is standing as surety and the rate of interest were not made known to him, and the blank spaces relating to the same were subsequently filled upon long after the date which Exhibit A-3 bears, and that too in the absence of the appellant, it cannot be held that the alterations are not material alterations and they do not discharge the surety from liability. Exhibit A-3, the letter of guarantee in the instant case, had been signed by the appellant on 29th March, 1973, when the loan had already been disbursed to the 1st defendant on 15th March, 1973. In the circumstances, I hold that as there was material alteration of the instrument of guarantee, Exhibit A-3, the appellant is absolved of all liability on it. The alterations thus made by way of filling the blank spaces in Exhibit A-3 cannot be held, under the circumstances to be unsubstantial (*sic*) nor to the benefit of the surety, and that as such, they do not discharge the surety from the liability. The alterations have been made in Exhibit A-3 certainly to the disadvantage of the appellant. Those alterations are certainly with respect to substantial character and the same is self-evident. When the alterations in the instant case have been made with respect to the amount advanced to the principal debtor as well as with respect to the rate of interest and also relating to the lands for which the loan is advanced, it cannot be held, that the said alterations are not material, because they carried out the intention of the parties already apparent on the face of it.

33. Mr. V. S. Subramaniam, the learned counsel for the 1st respondent-bank relies on the decision in *Nathu Lal* v. *Mst. Gomit Kuar*[1], for the following propositions :

> "The rule relating to the effect of material alterations in a deed made after its execution by or with the consent of any party thereto as it prevails in English Courts, applies to Indian cases and can be briefly summarised as follows :—
>
> If an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance however is not *ab initio* or so as to nullify any conveyancing effect which the deed has already had ; but only operates as from the time of such alteration and so as to prevent the person who has made or authorised the alteration and those claiming under him from putting the deed in a suit to enforce, against any, party bound thereby who did not consent

1. (1964) 1 S. C. J. 495.

1. 52 L. W. 313 : 67 I. A. 318 : (1941) 1 M. L. J. 204 : 190 I. C. 135 : A. I. R. 1940 P. C. 160

to the alteration, any obligation, covenant or promise thereby undertaken or made.

A material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainy some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed. The avoidance of the deed is not retrospective and does not re-vest or re-convey any estate or interest in property which passed under it. And the deed may be put in evidence to prove that such estate or interest so passed or for any other purpose than to maintain an action to enforce some agreement therein contained.

The alterations of the date of execution of the deed and certain other words by making holes in the document without the consent of the obligee by the party in whose favour it wos executed held in the particular case did not amount to material alterations within the meaning of the Rule."

34. In *Adsetts* v. *Hives*[1], a mortgagor executed a mortgage deed to A. B, the solicitor who prepared it. On the following morning, A.B., filled in the date, the names of the tenants and the date of the provision for redemption. It was held that this alteration did not render the deed void.

35. In *Doe* v. *Bingham*[2], by a deed a mortgagee conveyed to the mortgagor the legal estate, upon being paid the mortage money, and the latter reconveyed it to the tiustees for the purpose of securing an annuity.

1. 55 E. R. 226.
2. 106 E. R. 1082.

At the time of the execution by the mortgagee, there were several blanks in the deed but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee. It was held, that the deed was not therefore, void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity.

36. In *Kunhi Sankaran Nambiar* v. *Narayanan Tirumunpu*[1], a document mortgaging only one item of property, was duly executed, and attested, and another item of his property was interpolated by the mortgagor with the knowledge and consent of the mortgagee in the presence of the same attesting witnesses. The mortgagor registered the deed in the Sub-Registrar's Office within whose jurisdiction the latter item was situated.. It appeared that the object of adding the second item was not so much to give an additional security to the mortgage, as to enable the mortgagor to get the document registered near the place where he was living and thus prevent delay in registering the deed. It was held that there had been no fraud on the registration law and that the document was duly executed, attested and registered with regard to both items of property.

37. In *Bishop of Credition* v. *Bishop of Exeter*[2], a deed conveying the advowson of a church was, in October, 1899, signed, sealed, and delivered by all the parties to it but the bishop of E. It was intended that the deed should bear the date upon which it was executed by the Bishop of E., and in the engrossment the day and month were left blank, but the words "eighteen hundred and ninety-nine" were written. The deed was sent to the Bishop of E on 4th November, 1899. He executed it on 26th January, 1900, and

1. (1920) I. L. R.43 Mad. 405 : 38 M. L. J. 2: 11 L. W. 192.
2. (1904 to 1907) All E. R. 552.

the date of his execution was inserted in the deed, and "eighteen-ninety-nine" altered to "nineteen hundred". It was held that the deed was valid, as the alteration was only to carry out the intention of the parties.

38. In *Paget* v. *Paget*[1], in a deed of revocation, and a new settlement made by that deed, though after the sealing and execution of the said deed, blanks were filled up in the said deed and the said deed was not read again to the party nor released and executed, it was held that it was a good deed.

39. In the instant case, the 1st defendant principal debtor, has remained *ex parte* during the trial. Therefore, the evidence of P. W. 2 remains uncorroborated when he asserts that the 1st defendant accompanied the appellant when the latter came to his house and signed Exhibit A-3. It is not quite clear from the evidence of the appellant as D. W. 1 that he admitted that the signatures of the 1st and 2nd defendants were available in Exhibit A-3 when he had put his signature in it. Though it was the case of the appellant, both in his written statement as well as in his evidence, that certain documents were signed by him at the instance of the 1st defendant when he was about to be taken inside the operation theatre, *i. e.*, just about ten minutes prior to the operation performed on the appellant yet, he had not specifically stated that he had signed Exhibit A-3. The appellant only states in his evidence that his signature was obtained in some document, which was represented to him as a power of attorney. Therefore, I am constrained to uphold the case of the plaintiff, which is unfurled through the evidence of P. W. 2, that the signature in Exhibit A-3 was obtained either on 28th or 29th of March, 1973. It could not be on 28th March, 1973 because the appellant was discharged from the hospital only on 29th March, 1973 as evidenced by the contents of Exhibit B-1. P W. 2 himself admits that the signature of the appellant was not obtained in Exhibit A-3 on 15th March, 1973, which date it bears. Therefore, it has to be held that the signature of the appellant was obtained in Exhibit A-3 by P. W. 2 and that the blank spaces were filled up subsequent to 30th April, 1973 by P. W. 1. I hold that the filling up of the blank spaces relating to the material particulars of the contract of guarantee certainly amount to alterations in the deed of guarantee. That those alterations made in Exhibit A-3 amount to material alteration is evident from the fact that the alterations have been made with respect to the date of the contract, amount for which the appellant stands as surety, the property for which the amount is advanced and also the rate of interest. Both P. Ws. 1 and 2 have not stated in their evidence that there had been a common intention between the parties to pay the same as principal amount and also to pay interest at the rate mentioned in Exhibit A-3 and that in order to give effect to that intention, P. W. 1 had filled up the blank spaces in Exhibit A-3. Under these circumstances I hold that the alterations made in Exhibit A-3 render the deed of guarantee unenforceable under section 133 of the Indian Contract Act.

40. It is contended on behalf of the appellant that if it is to be held that Exhibit A-3 is a valid and enforceable document, under the circumstances, it would amount to giving a free hand to the Bank to substitute any onerous condition in the blank spaces in a printed form of deed of guarantee and subsequently plead that those blanks were filled up as a result of a common intention between the parties and that the same is for the advantage of the persons who stand as sureties. I am unable to reject this contention as unsustainable.

41. The surety, it is often said, is a favoured debtor. An unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract, avoids the contract against the person otherwise liable upon it. In a printed form of guarantee, if the signature of the guarantor is obtained prior to the filling up of the blanks relating to material

1. 21 E. R. 701.

particulars of the contract, the said filling up of the blank spaces in the printed form of guarantee amounts to material alteration especially when the said deed relating to the contract of guarantee is in the possession of the promisee or his agent, and discharges the contract of guarantee. In the instant case, the alterations have been made by the agent of the Mangadu Branch of the plaintiff-bank while the document was in its custody and so, the said alteration amounts to material alteration and the appellant, who is the promisor, is thereby discharged. In a document of guarantee, if the blank spaces relating to the amount for which the person stands as a guarantor, the date of the instrument, amount for which the person stands as a surety and the rate of interest for which the amount had been advanced, are filled up, such filling up would amount to substantial alteration, which are to the detriment of the surety and the said material alterations discharges the surety from liability. The said alterations are certainly to the disadvantage of the surety. They cannot be held as alterations of unsubstantial nature and that the surety cannot claim to be discharged. The conduct of P. W. 2 in this case in bringing the deed of guarantee from the bank to his house and asking the appellant to put his signature in it is certainly an act which is not in accordance with the normal procedure. Equally, the act of P. W. 1 in filling up the blank spaces in Exhibits A-3 without the knowledge of the appellant long after the signature of the appellant was obtained in it is really very strange.

42. There is nothing in the evidence to show that at least soon after the material alterations were made, P. W. 1 had informed the appellant or other parties to the document Exhibit A-3 about the same. It is only Exhibit A-6, copy of the suit notice, dated 2nd July, 1973 that contains the particulars of the transactions between the 1st defendant and the plaintiff-bank. It is mentioned in it only that the appellant and the 2nd defendant have executed the general form of guarantee, guaranteeing the due repayment of the loan on demand and that their liability is co-extensive with that of the principal debtor.

43. The true rule, in my opinion, applicable to the contract of guarantee is that if there is any agreement between the principals with reference to the contract of guarantee, the surety ought to be consulted. If the alteration is to the disadvantage of the surety, or its unsubstantial nature is not self-evident, the surety can claim to be discharged. The contrat of the surety should not be altered without his consent and the creditor should not undertake to alter the contract and then say, that though the contract had been altered, it was not done to the disadvantage of the surety, especially when such alterations were made with respect to material particulars regarding the contract of guarantee affecting the surety.

44. For the foregoing reasons, I disagree with the finding rendered by the trial Court and hold that the appellant is not liable to pay the suit amount as a surety for the 1st defendant.

45. In the result, the appeal is allowed, the judgment and decree of the trial Court in so far as they are against the 3rd defendant/appellant are set aside and the suit as against the 3rd defendant alone is dismissed without costs. There will be no costs in this appeal.

S. J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Bombay Burmah Trading Corporation Limited, a Company incorporated under the Companies Act having its registered Office at Bombay, a branch at Mudis, Pollachi Taluk, in Coimbatore District ... *Petitioner**

v.

A. T. Narayanaswami Pillai .... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 30 (iii)—Lease of cinema theatre, whether covered by the exemption—Landlord's application for fixing fair rent not maintainable—Statutes — Construction—Illustration to section cannot cut down or limit the scope and effect of the section.

Illustrations to statutory provisions are a rare commodity in modern drafting techniques. Even in their heyday, illustrations were usually put in by the legislative draftsmen merely as internal aid to the construction of substantive provisions, which they were avowedly meant to illustrate. Illustrations can by no means be allowed to cut down or limit the scope and effect of the substansive provisions much less to supplant them. Nor can illustrations be upgraded and construed as independent provisions in themselves. In a matter of statutory construction, illustrations must be put in their proper place and must be viewed from the proper perspective. Otherwise we would be mistaking the trees for the wood.

[*Para.* 8.]

Leases of buildings as a general rule, are covered by the Tamil Nadu Buildings (Lease and Rent Control) Act. The Act applies even to leases of non-residential buildings, as business premises. But the legislature wished to make a distinction between lease of a building without more and lease of an industrial or business complex in which building is only one of the items which figures. The latter is not so much a lease of a building, as lease of a commercial asset. The exemption is granted, therefore, to a lease which comprises not only a building, but includes certain fixtures, machinery, furniture or other articles belonging to the landlord and which are situate in the building and which would aid the tenant for the carrying on of which the tenancy has been entered into. The scope of this exemption is often described by the phrase "composite lease". The phrase is only a shorthand expression to denote the requirement of section 30 (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Where the lease is a composite lease in the sense that it is a composite of building as well as business assets, it is not necessary that the business part of the lease must be complete in every respect, leaving nothing to be desired and nothing to be supplemented by the tenant himself. Section 30 (*iii*) does not say that the lease must be of a business or industrial undertaking as a going concern. Nor does it require that the composite lease must be such that the business or industry leased along with the building must be in a ready running condition as at the date of the lease, even if it is not actually a going concern. A lease of a building *cum* industrial or business equipment in 'as is or where is' condition might still qualify for exemption, even though the equipment will need something more to operate. The question in every case will be one of substance and not one of literally applying either of the provisions of clause (*iii*) of illustration (2) appended to that section. This means that in the task of deciding whether the exemption applies to any given case, the Tribunals and Courts should avoid extreme positions one way or the other. They must

*C. R. P. No. 473 of 1979 and C. M. P. No. 2292 of 1979. *27th October*, 1980.

avoid the mistake of treating a building lease as a composite lease merely because of the presence of certain trivial items of business equipment in the building At the same time, Courts should also avoid the mistake of refusing the exemption on the ground that the lease did not include some minor pieces of machinery or furniture or equipment, which may be regarded as part of the equipment for the intended line of trade. The matter has to be looked into as one of substance in the facts and circumstances of each case, as established by evidence on record.

[*Para.* 10.]

In the instant case, on the facts, the lease of the cinema theatre was held to be one to which section 30 (*iii*) of the Act clearly applied and that the landlord's application for fixing fair rent was incompetent.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Contol) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge and Appellate Authority, Udumalpet, dated 16th October, 1978 and made in R. C. A. No. 21 of 1978 (R. C. O. P. No. 19 of 1976 D. M. C. 7 Pollachi).

C. M. P. No. 2292 of 1979.

Petition presented to the High Court to revise the certified copy of the lease deed dated 31st October, 1965 and admit the same as additional evidence in the aforesaid C. R. P. No. 473 of 1979 herein.

N. Varadarajan, for Petitioner.

V. C. Rangadurai and *K. Narayanaswami*, for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner, Bombay Burmah Trading Corporation Limited, owns a tea estate in a place called Mudis in Anai Malais. This is a place where the petitioner's employees and other residents in the locality have their residences and transact their business. With the object of providing entertainment to their own employees and the general public at Mudis, the petitioner constructed a cinema theatre with subsidiary buildings and annexes. They had the buildings equipped with fixtures, items of furniture and certain items of machinery and articles to render the theatre fit for projection and exhibition of cinematograph films. The construction of the theatre was completed in October, 1960. The fixation of machinery and fittings in the theatre was also proceeding almost to a conclusion. At that time, the petitioner leased out the entire cinema theatre complex to one Narayanaswami Pillai, the respondent in this revision. The lease was for a period of five years at a monthly rent of Rs. 750. It was extended for a further period of five years on the same rent, but actually the tenant held over and continued in possession even thereafter, paying the same rent as before.

2. In 1972, the petitioner filed a civil suit against the tenant for his eviction from the cinema theatre. The respondent resisted the suit contending that it did not lie. He said that he was a statutory tenant amenable to eviction only under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and not by a civil Court in an ejectment suit. This plea in defence was accepted by the Court and the suit was dismissed as not maintainable.

3. The landlords did not react to the dismissal of this suit by filing an application for eviction before the Rent Controller under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. They invoked this Act for quite another purpose, namely, for fixation of fair rent, apparently acquiescing in the position that the tenant will continue. In the application filed by them for fixation of fair rent, the landlords gave a full description of the subject-matter of the lease. They described it as a "cinema theatre building with subsidiary buildings" constructed by them for the express purpose of "conducting cinema shows" for providing entertainment to their employees and

members of the "public" in Mudis. Details of the buildings and what furnishings, fittings and equipment they contained were set out in the body of the application as well as in a separate schedule annexed to the application. They included, among other items, 'cinemascope scree-frame curtain, cinemascope lens, adaptors, automatic curtain-mover for the screen' and "other fittings". The relief claimed in the application was to fix the fair rent "for the theatre buildings, land and fittings etc.," as described in the schedule".

4. The application for fixation of fair rent was opposed by the tenant on the main ground that it was not maintainable. It was contended that the lease of the cinema theatre was exempted by section 30 (*iii*) of the Act. This plea was rejected by the Rent Controller. He took the view that the tenant was estopped from putting forward such a plea, he having taken up the position in the earlier suit that he was a statutory tenant to whom the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 alone applied. On this basis, the Rent Controller upheld the maintainability of the fair rent application and posted it for further enquiry on merits. This order on preliminary issue as to jurisdiction was taken on appeal by the tenant. The appellate authority disagreed with the decision of the Rent Controller and upheld the tenant's objection. The appellate authority held that even though in the earlier suit the tenant had relied on the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act and had pleaded it as a bar to the maintainability of the suit, he was not estopped from putting forward the contention in the present proceedings that the lease in his favour was exempt from section 30 (*iii*) of the Act. The appellate authority relied on the principle that there was no estopprel against the statute. Proceeding to examine the question whether the lease of the cinema theatre building was covered by the exemption enacted by section 30 (*iii*) of the Act, as contended for by the tenant, the appellate authority referred to the landlord's averments in the application for fixation of fair rent, and the detailed description given therein of the buildings, fixtures, and the items of machinery in the premises. On a consideration of the subject-matter of the lease and its nature in the light of those very averments, the appellate authority held that section 30 (*iii*) of the Act clearly applied to the instant case In that view, he dismissed the petitioner's application for fair rent as incompetent.

5. In this revision petition, the landlords seek to canvass the correctness of the appellate authority's decision. Mr. Varadarajan, learned counsel for the landlords, contended that the lease in the present case cannot be regarded as of a kind which falls within the coverage of section 30 (*iii*) of the Act. Learned counsel invited my attention to *Illustration* (2) to the said section in an effect to make good his submission. This *illustration* is in the following terms :

> "*Illustration* 2. – Where the lease is of land and building together with fittings, fixtures, cinematograph talkie equipments, machinery and other articles, the Act does not apply to such building".

6. Learned counsel's point was that unless the lease included the full complement of cinematograph talkie equipment and other apparatus, the exemption would not apply. Learned counsel submitted that the *Explanation* would not apply even if one item of cinema theatre equipment was missing or had been omitted from the subject-matter of the lease.

7. I do not agree with this way of understanding the exemption provision. In my judgment, *Illustration* (2) to section 30 (*iii*) cannot be read and understood in isolation or as an operative provision in itself. Nor can it be read in a literal way. *Illustration* (2), no doubt, mentions a cinematograph talkie equipment, among other items. But the mention of that equipment is only by way of illustration. It cannot be suggested that a fully equipped cinema theatre, but equipped for showing only 'silent' films, cannot come within the statutory exemption,

for the one and only reason that it lacks a 'talkie' equipment mentioned in *illustration* (2). In my judgment, this *illustration* does not call for an inventory of the equipment of cinema theatres to find out if the inventory answers and tallies fully and in every respect with the items mentioned in the *illustration*.

8. I do not also approve of the excessive importance sought to be placed by Mr. Varadarajan on the language of *illustration* (2). Illustrations to statutory provisions are a rare commodity in modern drafting technique. Even in their heyday, illustrations were usually put in by the legislative draftsmen merely as internal aids to the construction of substantive provisions, which they were avowedly meant to illustrate. It follows that illustrations can by no means be allowed to cut down or limit the scope and effect of the substantive provisions, much less to supplant them. Nor can illustrations be upgraded and construed as independent provisions in themselves. In a matter of statutory construction, illustrations must be put in their place and must be viewed from the proper perspective. Otherwise, we would be mistaking the trees for the wood.

9. *Illustration* (2) is only a sample illustration which the legislature has set out by way of illustrating the thrust of the exemption provisions of section 30 (*iii*). In order to ascertain the real scope of the exemption, we have to turn to the language of section 30 (*iii*) itself for a safe determination. The section is in the following terms :

> "Nothing contained in this Act shall apply :— . . . . (*iii*) Any lease of the building under which the object of the tenant is to run the business or industry with the fixtures, machinery, furniture or other articles belonging to the landlord and situated in such building."

10. The idea behind this provision is simple. Leases of buildings, as a general rule, are covered by the Act. The Act applies even to leases of non-residential buildings, as business premises. But the legislature wished to make a distinction between lease of building without more, and lease of an industrial or business complex in which building is only one of the items which figures. The latter is not so much a lease of a building, as lease of a commercial asset. The exemption is granted therefore to a lease which comprises not only a building, but includes certain fixtures, machinery, furniture or other articles belonging to the landlord and which are situated in the building, and which would aid the tenant in carrying on the particular business or industry for the carrying on of which the tenancy has been entered into. The scope of this exemption is often described by the phrase "composite lease". The phrase is only a shorthand expression to denote the requirements of section 30 (*iii*). Where the lease is a composite lease in the sense that it is a composite of building as well as business assets, it is not necessary that the business part of the lease must be complete in every respect, leaving nothing to be desired and nothing to be supplemented by the tenant himself. Section 30 (*iii*) does not say that the lease must be of a business or industrial undertaking as a going concern. Nor does it require that the composite lease must be such that the business or industry leased along with the building must be in a ready running condition as at the date of the lease even if it is not actually a going concern. A lease of building *cum* industrial or business equipment, in 'as is or where is' condition might still qualify for exemption, even though the equipment will need something more to operate. In my judgment, the question in every case would be one of substance, and not one of literally applying either of the provisions of clause (*iii*) or of Illustration (2) appended to that section. This means that in the task of deciding whether the exemption applies to any given case, the Tribunals and Courts should avoid extreme positions one way or the other. They must avoid the mistake of treating a building lease as a composite lease merely because of the presence of certain trivial items of business equipment in the building. At the same time, Courts should also avoid the mistake of refusing the exemption on the ground that the lease did not include some minor piece of

machinery or furniture or equipment, which may be regarded as a part of the equipment for the intended line of trade. As I observed earlier, the matter has to be looked into as one of substance having regard to the facts and circumstances of each case, as established by the evidence on record.

11. In the present case, the landlords themselves admit that the lease was of a cinema theatre, as such together with the cinema equipment which they had fitted the buildings with upto the date of the lease. The tenant might have had to supplement the existing fittings and cinema equipment leased out to him, in order to make the theatre fully equipped for exhibition of films. But that does not detract from the lease being a composite lease as contemplated by section 30 (*iii*). I am, therefore, in entire agreement with the conclusion of the appellate authority that the lease in the present case does not brook an application for fixation of fair rent, or any other proceeding for that matter under the Rent Control Act. The result is, that this civil revision petition is dismissed. In the peculiar circumstances of the case, I do not make any order as to costs.

12. C. M. P. No. 2292 of 1979 is an application filed by the landlord to mark the lease deed as additional evidence in this revision. But I find it unnecessary to go into the terms of the lease deed, since the vital facts necessary for the disposal of the civil revision petition are to be found in the petitioner's own pleadings and other materials on record. C. M. P. No. 2292 of 1979 is accordingly dismissed.

R. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Sri Saravana Chit Fund Company, firm Periakulam through its Managing Partner S. Jaimulladeen .... *Petitioner**

v.

Sekudeen son of K. Sikkendar Rowther at Pallivasal Theru, Thenkarai, Periakulam and others ... *Respondents.*

(A) *Chit Funds Act (XXIV of 1961), section 25—Chit Fund firm—Suit against subscriber for amount under a transaction—Notice not given—Suit dismissed for want of notice—Appeal by firm pending—Petition to withdraw suit, whether maintainable.*

(B) *Civil Procedure Code (V of 1908), Order 23, rule 1—Withdrawal of suit, when permissible.*

Order 23, rule 1 (3), Civil Procedure Code, clearly vests the Court with the power to permit withdrawal of a suit with liberty to file a fresh suit in respect of the very same subject-matter if the suit fails by reason of some formal defect. It also requires the Court to find out whether there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or for part of the claim. In the instant case, the suit had been dismissed for a formal, technical defect of want of notice under section 25 of the Chit Funds Act. For that the parties should not suffer. If the permission for the withdrawal with liberty to file a fresh suit by the plaintiff Chit Fund Company is not granted, there will be miscarriage of justice since the first respondent-member himself had admitted liability under the promissory note executed by him. [*Para.* 5.]

Case referred to :—

Charles Samuel v. *Board of Trustees*, (1978) 2 M. L. J. 243.

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*C. R. P. No. 3016 of 1978.

25th October, 1980.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Dindigul, dated 1st November, 1978 and made in I. A. No. 679 of 1978 and in A. S. No. 18 of 1978.

K. Sarvabhauman, for Petitioner.

S. Senthilnathan, for Respondent.

The Court made the following

ORDER. – This revision arises out of an order passed in I. A. No, 679 of 1971 in A. S. No. 18 of 1978.

2. The short facts leading to the filing of the application I. A. No. 679 of 1978 are as follows:—The petitioner in this interlocutory application, as the plaintiff, filed the suit O. S. No. 229 of 1977, on the file of the District Munsif's Court, Periakulam, to recover a sum of Rs. 3,150 with interest from the respondents herein. The plaintiff, which is a chit fund company, had the first defendant as its member. The first defendant joined Chit No. 21-group which is for a total sum of Rs. 5,000. This amount is payable in 25 instalments at the rate of Rs. 200 per month. In the second instalment, the first defendant bid at the auction on 15th March, 1976, and received the amount. After doing so, the first defendant executed a pronote for Rs. 4,600 for the future 23 instaltments. This was on 2nd April, 1976. According to the petitioner, the first defendant paid Rs. 1,400 for instalments Nos. 3 to 9 and Rs. 50 for the 10th instalment. Later, he defaulted from 13th September, 1976. Hence, the plaintiff came forward with the present suit demanding the sum of Rs. 3,150 towards principal and Rs. 259.35 towards interest. Defendants 2 and 3 are the legal representatives of the guarantor for the first defendant who was no other than the wife of the first defendant.

3. The first respondent-first defendent contended that it is true that he executed a promissory note for for 4,600 for the future 23 instalments, that the plaintiff is not entitled to claim the entire amount in one lump sum, that each instalment has a separate cause of action, that the plaintiff ought to have filed the suit only for the defaulted subscriptions and not for the entire suit amount and that the suit is premature. During arguments it was contended that the suit is not maintainable since no notice under section 25 of the ChitFund Act has been given. According to the first defendant, such a notice is mandatory and the failure to issue such a notice will result in the dismissal of the suit.

4. The trial Court, holding that the suit ought to have been filed for the defaulted subscriptions only upto 20th July, 1977 and that the suit is not maintainable for want of notice under section 25 of the Chit Fund Act, dismissed the suit. Aggrieved by the judgment and decree of the trial Court, the plaintiff filed an appeal A. S. No. 18 of 1978 before the Additional Subordinate Judge at Dindigul. In that appeal, the plaintiff filed I. A. No. 679 of 1978 praying for permission to withdraw the appeal with permission to file a fresh suit on the same cause of action. In support of that application, the petitioner has averred that his suit has been dismissed for want of notice under section 25 of the Chit Fund Act, that the petitioner must be permitted to file a fresh suit on the same cause of action after issuing a notice to the first respondent under section 25 of the Chit Fund Act and that if such permission is not given irreperable loss and hardship will be caused to the petitioner. The Subordinate Judge, Dindigul, who heard this interlocutory application filed under Order 23, rule 1, Civil Procedure Code, following the decision reported in *Charles Samuel* v. *Board of Trustees*[1], came to the conclusion that this is not a fit case in which the discreation under "Order 23, rules 1 and 2, Civil Procedure Code," should be exercised. Hence he dismissed the application with costs. Aggrieved by the order passed by the learned Subordinate Judge, the plaintiff in O. S. No. 229 of 1977 has filed the present revision petition.

5. Mr. Sarvabhauman, the learned counsel for the petitioner, took me through the

1. (1978) 2 M. L. J. 243.

decision reported in *Charles Samuel* v. *Board of Trustees*[1], and also the unreported decision rendered by Varadarajan, J., in *Sri Meenakshi-sundareswarar Devasthanam, Madurai* v. *Irulayee Ammal and 3 others*[2]. In the judgment reported in *Charles Samuel* v. *Board of Trustees*[1], of a learned Single Judge of our High Court, it has been clearly observed that the grant of leave to withdraw a suit is always a matter of discretion of the Court and each case has to depend on the facts arising in that case. No doubt in that decision, the learned Judge has not permitted the petitioner to withdraw the suit under Order 23, rules 1 and 2, Civil Procedure Code, even though the suit was dismissed for want of proper notice. Varadarajan, J., in S. A. No. 2325 of 1975, after referring to various decisions, finally observed :

"In the present case the plaintiff's title to the suit properties is not in dispute. It was only contended that the defendants are in possession of the properties as its tenants. In these circumstances it is not possible to say that it is not open to the plaintiff to terminate the tenancies and seek to evict the defendants. The relief of possession could not be given to the plaintiff in the present action having regard to the fact that no notice of termination of tenancies has been given. It will not be in the interests of justice to dismiss the suit once and for all on the technical defect of not issuing a notice of termination of tenancies. Therefore, I am of the opinion that this is a fit case in which leave to withdraw the suit with liberty to file a fresh suit after termination of the tenancies has to be granted to the petitioner in the civil miscellaneous petition".

In the present case, there is no dispute with regard to the executing of the promissory note. The objection taken is that the suit is premature in as much as some of the instalments have not become due. Another objection taken is that the suit is defective because notice under section 25 of the Chit Fund Act has not been given. As observed by Varadarajan, J., it will not be in the interests of justice to dismiss the suit once and for all on the technical defect of not issuing a notice under section 25 of the Chit Fund Act and also on the fact that the suit is premeature. In my view, no prejudice will be caused to the respondent if the leave sought for is granted, since the dismissal of the suit was on a formal technical defect. Order 23, rule 1, Civil Procedure Code, states :-

"(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :

* * * * * *

(3) Where the Court is satisfied . . .

(*a*) that a suit must fail by reason of some formal defect, or

(*b*) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of the suit or part of the claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim".

The abovesaid Rules clearly vests the Court with the power to permit withdrawal of a suit with liberty to file a fresh suit in respect of the very same subject-matter if the suit fails by reason of some formal defect. It also requires the Court to find out whether there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or for part of the claim. As I have already observed, the suit has been dismissed for a formal technical defect of want of notice under section 25 of the Chit Fund Act. No doubt, the trial Court has also held that the claim for all the instalments payable is premature except for

1. (1978) 2 M. L. J. 243.
2. S. A. No. 2325 of 1975.

certain instalments. The Subordinate Judge, Dindigul, who has disposed of the interlocutory application has not at all considered the provisions of Order 23, rule 1 (3), Civil Procedure Code. There is absolutely no finding as to whether the suit failed for a formal defect or not. He has also not discussed as to whether there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the very same subject-matter. This failure to discuss has vitiated the order of the Court below and as such the sub-Court has not exercised the jurisdiction vested in it by law. I am convinced that the suit has been dismissed for a formal defect and for that, the parties should not suffer. If the permission for the withdrawal with liberty to file a fresh suit is not granted, there will be miscarriage of justice, since the first respondent himself admits liability under the promissory note executed by him.

6. In these circumstances, the revision petition is allowed without costs. The result is the petitioner herein is permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action.

R. S. ——— *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Ratnam, J.*

M. Venkatachalapathy ... *Petitioner**

v.

Saroja alias Thangammal ... *Respondent.*

(A) *Hindu Marriage Act* (*XXV of 1955*) *as amended by Act* (*LXVIII of 1976*), *section 13* (*1*) (b)—*Petition for divorce by husband against wife—Direction sought for wife to appear in Court and submit herself to medical examination—Allegation of her having infantile uterus—Petition dismissed.*

(B) *Civil Procedure Code* (*V of 1908*), *section 151—Cannot be invoked for an order for compulsory medical examination.*

When the petitioner had an opportunity to let in medical evidence to establish the condition of his wife—respondent of having an infantile uterus as claimed by him but took no steps, and had taken the definite stand that he was not going to examine any doctor, he should be taken to have not established that his wife had infantile uterus and hence his interlocutory application in the lower appellate Court to direct the wife to submit to medical examination was rightly rejected as frivolous.

It is settled law that a person cannot be directed to be examined medically against her wish. Since the respondent has opposed the application of the petitioner and also denied the defects in her, it was clear that any medical examination, if ordered, would only be against her wish, which cannot be done. Though the Courts below had not proceeded on this ground, yet the dismissal of the application by the learned District Judge could be sustained on this ground as well. [*Para.* 3.]

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*C. R. P. No. 2400 of 1980. 27*th November*, 1980.

Cases referred to:—

Polayarapu Venkateswaralu Minor by guardian v. *Polayarapu Subbayya*, (1951) 2 M. L. J. 561 : 64 L. W. 1029 : A. I. R. 1952 Mad. 150; *Ramanathan Chettiar* v. *Chinna Lakshmi Achi*, I. L. R. (1956) Mad. 65 : (1955) 1 M. L. J. 260 : 68 L. W. 156 : A I.R. 1955 Mad. 546; *Pulayarthi Sreeramamurthi* v. *Pulayarthi Lakshmikantam*, 1955 An W. R 13; *Krishnamurthi Ayyar* v. *Govindaswami Pillai*, (1966) 2 M. L. J. 383 : 79 L. W. 278 : A. I. R. 1966 Mad. 443.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Additional District Judge, Tiruchirapalli dated 12th August, 1980 and made in I. A. No. 49 of 1980 in C. M. A. No. 70 of 1979.

R. G. Rajan, *S. Ethiraj* and *D. Sekhar*, for Petitioner.

K. Raman and *R. Sitaraman*, for Respondent.

The Court delivered the following

JUDGMENT:—The husand, who initiated proceedings against his wife under section 13 (1) (*b*) of the Hindu Marriage Act XXV of 1955 as amended by Act LXVIII of 1976, is the petitioner in this civil revision petition, which is directed against the order dismissing an application filed by him to direct his wife, the respondent herein, to appear in Court and submit herself to a medical examination. The petitioner, in the course of his application, stated that the respondent is suffering from a deformity described as infantile uterus and it was only on account of this condition, she was not able to live a normal life with the petitioner and had left the petitioner since April, 1973 and living separately and therefore, the petitioner is entitled to a decree of divorce on the ground of desertion. That application was resisted by the respondent on several grounds, which need not be noticed in detail for purposes of the present civil revision petition. Suffice it to say that the Sub-Court, Tiruchirapalli, enquired into this application of the petitioner and found that the ground of assertion put forth by the petitioner has not been established. Consequent to this finding, the application filed by the petitioner was dismissed. Aggrieved by that, the petitioner preferred C. M. A. No. 700 of 1979 before the District Court, Triuchirapalli, and that appeal is now pending. In I. A. No. 49 of 1980, the petitioner sought a direction to the effect that his wife, the respondent herein, should appear in Court, and submit herself to a medical examination by a competent medical expert. In paragraphs 3 and 7 of the affidavit in support of that application, the petitioner had stated that the respondent had a physical deformity which rendered her unfit for normal marital life and child-bearing and that in order to establish that, it is necessary that the respondent should be examined by competent doctors. That application was resisted by the respondent herein on the ground that there is no physical deformity at all in her as claimed by the appellant and that though the petition for divorce was pending for more than three years, no application for medical examination of the respondent had been earlier filed by the petitioner. It was also further pointed out on behalf of the respondent that none of the doctors had been summoned to give evidence on their medical examination and that would establish the *mala fide* conduct of the petitioner. The respondent further stated that the petitioner is romantically inclined and had also married another girl and had turned her out as well and that the application was only filed with a view to prolong the proceedings. The learned Additional District Judge, Tiruchirapalli, who enquired into this application, held that the petition filed by the petitioner was a frivolous and unsustainable petition as, even according to the petitioner in the course of his evidence he had stated that he was not going to examine any of the doctors to establish the physical deformity

of the respondent. On this conclusion, the application filed by the petitioner was dismissed. It is the correctness of this order that is challenged in this revision.

2. No doubt, the petitioner has come forward with a case that the respondent suffers from a deformity known as infantile uterus which renders her incapable of leading a normal married life. The petitioner has to establish that the condition of the respondent was responsible for her having left the petitioner since April, 1973. In the course of the proceedings before the trial Court, the petitioner did not take any steps whatever either for examining the doctors or even by asking for a medical examination of the respondent. Indeed, as has been pointed out by the learned District Judge, the definite stand that was taken by the petitioner was that he was not going to examine any of the doctors. Though the learned counsel for the petitioner would attempt to explain that this statement was made by the petitioner in a different context, a perusal of the evidence of the petitioner indicates that he was not anxious to let in any medical evidence with reference to the alleged deformity of his wife, the respondent herein. In that state of affairs, the petitioner should be taken to have not established that his wife, the respondent herein, is having infantile uterus and therefore, he would not be entitled to the relief prayed for by him. It is only to cover up this lacuna a that the petitioner has come forward with the present application. The Court below was justified in treating this application as a frivolous application especially when the petitioner had an opportunity to let in medical evidence to establish the condition of the respondent as claimed by him; but did not do so.

3. In addition, there is another insurmountable difficulty in the way of the petitioner. Section 151 of the Code of Civil Procedure cannot be resorted to for the purpose of compelling a person to under go a medical examination. Indeed, the Courts have consistently declined to permit the medical examination of a party to the proceedings. In *Polayarapu Venkateswaralu minor by guardian and mother, Haramappa* v. *Polayarapu Subbayya*[1], Raghava Rao, J., had occasion to consider whether it is open to the Court to direct a party to appear before Court in order to enable a medical expert to take blood sample for testing the same with a view to decide the question of legitimacy. It was pointed out that there is no provision either in the Code of Civil Procedure or in the Indian Evidence Act which provides for a test of that type and that if a party is unwilling to offer his blood for a test of this kind, he cannot be forced to do so. In this view, the order of the Court below directing the medical examination of the blood sample was set aside. In *Ramanathan Chettiar* v. *Chinna Lakshmi Achi*[2], Rajagopala Ayyangar, J., had occasion to consider whether the Court has power to compel a party to be examined by a doctor against her consent. The learned Judge held that the Court has no power to compel a medical test on a human being without his or consent apart from a statute which clothes the Court with such power and section 151 of the Civil Procedure Code has no application to such a case. The learned Judge, however, added that it is open to the Court to draw any adverse inference against a party who refused to examine himself or herself. In *Pulayarthi Sreeramamurthi* v. *Pulayarthi Lakshmikantam and another*[3], Umamaheswaram, J., considered the question whether by an order of Court a party can be compelled to undergo medical examination. After considering the relevant cases, the learned Judge concluded that in the absence of any statutory provision compelling the medical examination of a party and restricting the enjoyment of personal liberty of that person, it is not right to rely upon the general or inherent powers of the Court under section 151, Civil Procedure Code to achieve that purpose. In *Krishnamurthi*

1. (1951) 2 M. L. J. 561 : 64 L. W. 1029 : A. I.R. 1952 Mad. 150.
2. I. L R (1956) Mad 66 : (1955) 1 M. L. J. 260 : 68 L. W. 156 : A. I. R. 1955 Mad. 546.
3. 1955 An. W. R. 13.

Ayyar v. *Govindaswami Pillai and another*[1], Natesan, J., had to consider the question whether an election Court dealing with an election dispute under the Panchayats Act can order compulsory medical examination of a person who figured as a party to those proceedings. The learned Judge observed that it is the birth right of a man to claim that there shall be no trespass to his person unless provided by law and there is no warrant in the Code of Civil Procedure for an order for compulsory medical examination of a party against his wish. These decisions, therefore, lay down that a person in the position of the respondent cannot be directed to be examined medically against her w sh. Since the respondent has opposed the application of the petitioner and had also denied the defects in her, it is clear that any medical examination, if ordered, would only be against her wish, which as stated earlier, cannot be done. Though the Court below has not proceeded on this ground, yet, the dismissal of the application by the learned District Judge could be sustained on this ground as well. There is absolutely nothing illegal or irregular in the order of the Court below dismissing the application filed by the petitioner That order is perfectly correct and justified and deserves to be upheld. This Civil Revision Petition fails and is dismissed with costs.

R. S. —— *Revision petition dismissed.*

1. (1966) 2 M. L. J. 383: 79 L. W. 278 : A. I. R. 1966 Mad. 443.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *S. Nainar Sundaram, J.*

The Liquidator and Co-operative Sub-Registrar (Stores) P-2076, Melapalayam Nehru Multi-Purpose Co-operative Society ... *Appellant**

v.

M. S. Sahul Hameed and others ... *Respondents.*

Tamil Nadu Co-operative Societies Rules (1963), rule 76 (3)—Order passed by statutory authority—Order not communicated or made known to party affected—Computation of time for agitation against the order—Time runs only from date of knowledge of the said order by the said party.

If a statutory authority passes an order without putting the party to be affected on notice of the pronouncement of the order and keeps it in its file without either communicating the same to the party affected or furnishing a copy of the same *suo motu* it will be highly unfair and offending all sense of equity and fairplay to interpret any rule of law with regard to the limitation of time and hold that time for agitation by the party affected must run from the date of the order of which the concerned party had no notice at all. In the absence of statutory provisions as found in the Code of Civil Procedure, and in the absence of express Rules, governing the proceedings of the statutory authorities, any computation of time with reference to agitation against any order passed by any such statutory authority must definitely run only from the date of the knowledge of the said order by the said party either actually or constructively. [*Paras.* 4, 14.]

*S. A. No. 2004 of 1977. 17*th December*, 1980.

Cases referred to :—

Sagarmal Marwari v. *Lachmisaran Misir*, A. I. R. 1923 Patna 129; *Swaminathan* v. *Lakshmanan*, (1930) 59 M. L. J. 585 ; I. L R. 53 Mad. 491 : 31 L. W. 487 : A. I. R. 1930 Mad. 490; *Abdul Ali* v. *Mirja Khan*, I. L. R. (1904) 28 Bom. 8; *Annamalai* v. *Cloete*, (1883) I. L. R. 6 Mad. 189; *Seethamma* v. *Bankara*, (1889) I. L. R. 12 Mad. 1; *Secretary of State* v *Gopisetti Narayanaswami*. (1911) I. L. R. 34 Mad. 151; *Mahipat* v. *Lakshman*, (1900) I L. R. 24 Bom. 426 ; *Chandu* v. *Mast Ram*, A. I. R. 1924 Lah. 135 ; *Mohammad Zaman* v. *Hans Raj*, A. I. R. 1938 Lah. 707; *Venkataswami* v. *Ganapathia*, (1952) 1 M.L.J. 765: 65 L W. 448 : A I. R. 1953 Mad. 465; *Harish Chandra* v. *Deputy Land Acquisition Officer*, (1962) 1 S. C J. 696 : (1962) 2 An. W. R. (S. C.) 10 : (1962) 2 M. L. J. (S. C.) 10 : (1962) 1 S. C. R. 676 : A. I. R. 1961 S. C. 1500 ; *State of Punjab* v. *Mst. Qaisar Jehan Begum*, (1964) 1 S C. J. 33: (1964) 1 M. L J. (S. C.) 9 : (1964) 1 An. W. R. (S.C.) 9 : (1964) 1 S. C. R 971: A I. R. 1963 S. C. 1604; *Gian-Chand* v. *Union of India*, A. I. R. 1976 Del. 83.

Appeal against the decree dated 23rd February, 1977 of the Court of the Subordinate Judge, Tirunelveli in Appeal Suit No. 278 of 1975, preferred against the decree of the Court of the Additional District Munsif, Tirunelveli in Original Suit No. 592 of 1969

K. Srinivasan and *K. Raghunathan*, for Appellant.

T Martin, for Respondent.

The Court delivered the following

JUDGMENT:—The 1st defendant in O. S. No. 592 of 1969 on the file of the Additional District Munsif, Tirunelveli, is the appellant in this second appeal. The 1st respondent herein is the plaintiff and respondents 2 to 6 are the other defendants in this said suit. The plaintiff laid the suit to set aside the claim order passed by the Deputy Registrar of Co-operative Societies, Tirunelveli, in R.C. No. 18972 of 1967, dated 30th December, 1967 and for declaration of his title over the suit property. The 1st defendant alone contested the suit and the other defendants remained *ex parte* Apart from the merits, the 1st defendant also raised the plea of limitation in that, the suit having come to be filed on 11th December, 1968, six months beyond the date of the order of the Deputy Registrar, is barred under Rule 76 (3) of the Tamil Nadu Co-operative Societies Rules, 1963, hereinafter referred to as "the Rules". The first Court went into the questions and held against the plaintiff both on merits and on the question of limitation. The plaintiff appealed and the appeal A. S. No. 278 of 1975 was heard and disposed of by the II Additional Subordinate Judge, Tirunelveli and the lower Appellate Court found that the suit is in time, computing the period of six months prescribed under the said Rules from the date of obtaining the copy of the order of the Deputy Registrar, namely, 23rd August, 1968, and also held that the plaintiff is a *bona fide* purchaser for consideration and hence the order of the Deputy Registrar is liable to be set aside and consequently decreed the suit of the plaintiff as prayed for with costs. The present Second Appeal is directed against the judgment and the decree of the lower Appellate Court.

2. At the time of the admission of the Second Appeal the only substantial question of law mooted out for consideration ran as follows :

> "Whether the suit filed on 11th December, 1968 to set aside the claim order dated 30th December, 1967 is barred by limitation by virtue of rule 76 (3) of the Madras Co-operative Societies Act and Rules ?"

3. The order of the Deputy Registrar dismissing the claim application of the plaintiff was passed on 30th December, 1967. According to the plaintiff, he had no knowledge of the same and he came to know about it only on 7th June, 1968 when he applied for the copy of the order and the copy of the order was furnished to him on 23rd August, 1968, and hence the suit filed on 11th December,

1968 cannot be held to be barred under Rule 76 (3) of the Rules. Rule 76 (3) of the Rules reads as follows :

> "When a claim or an objection is preferred the party against whom an order is made may institute a suit within six months from the date of the order to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive".

There is no provision either in the Tamil Nadu Co-operative Societies Act or the Rules framed thereunder enjoining upon the authorities thereunder to pronounce the order in open Court, similar to the provisions under Order 20, rule 1 of the Code of Civil Procedure. It is not stated before me that notice of the pronouncement of the order by the Deputy Registrar was given to the plaintiff There is no challenge of the stand of the plaintiff that he came to know of the order of the Deputy Registrar only on 7th June, 1968 when he applied for the copy of the said order. It is common ground that the copy of the said order was actually furnished only on 23rd August, 1968. The 1st defendant is not putting forth the grievance that the time taken by the plaintiff for obtaining the copy of the order of the Deputy Registrar, namely the time between 7th June, 1968 and 23rd August, 1968, ought not to have been excluded from the period of six months stipulated under rule 76 (3) of the Rules. If time is computed from 23rd August, 1968, the suit filed on 11th December, 1968, will be within time, Hence, the only question is as to whether the time between 30th December, 1967 and 7th June, 1968 should stand excluded from the period of six months stipulated under the said Rules.

4. Apart from authorities it appeals to the judicial sense that where an order is passed by a statutory authority of which no notice has been given to the party affected, for the said party to agitate against that order, he must come to know of it so as to enable him to take the appropriate proceedings to vindicate his rights. If a statutory authority passes an order without putting the party to be affected on notice of the pronouncement of the order and keeps it in the file without either communicating the same to the party affected or furnishing a copy of the same *suo motu*, it will be highly unfair and offending all sense of equity and fairplay to interpret any rule of law with regard to the limitation of time and hold that time for agitation by the party affected must run from the date of the order of which the concerned party had no notice at all. In the absence of statutory provision as found in the Code of Civil Procedure and in the absence of express rules governing the proceedings of the statutory authorities, any computation of time with reference to agitation against any order passed by any such statutory authority must definitely run only from the date of the knowledge of the said order by the said party either actually or constructively.

5. The above principles have found exposition in a number of authorities and it will be worthwhile to refer to them to appreciate how the Courts have interpreted the rule of law which has not expressly enjoined upon the authorities concerned either to pronounce the order openly after due notice to the parties or to communicate the same to the said parties.

6. In *Sagarmal Marwari* v *Lachmisaran Misri*[1], a Division Bench consisting of Dawson Miller, C J, and Mullick, J., considered a matter which arose under the Code of Civil Procedure and they deprecated the practice of not pronouncing judgment in open Court, which they characterised as a direct breach of the practice laid down in Order 20, rule 1 and they held that in all case that Rule ought to be complied with.

7. In *Swaminathan* v. *Lakshmanan*[2], a Division Bench of this Court consisting of Venkatasubba Rao and Madhavan Nair, JJ., dealt with a case arising under the Registration Act with reference to laying of

1. A. I. R. 1923 Pat 129.
2. (1930) 59 M. L. J. 585: I. L. R. 53 Mad. 491. 31 L. W. 487 : A. I. R. 1930 Mad. 490.

a suit against the order of the District Registrar, under section 77 thereof which lays down that the person affected by the order of the District Registrar, may within 30 days after the making of the order of refusal, institute a suit for a decree directing the document to be registered I find that the separate judgments of the two learned Judges deal with the question in a very elucidative manner. The observations of Venkatasubba Rao, J. run as follows :

"I have now referred to the relevant sections of the Act and shall proceed to consider the points raised. Apart from authority, it seems to me that there can be no valid order unless it is made after notice to the parties affected by it, or, it is communicated to them in the absence of such notice. To take a contrary view seems opposed to reason and principle. The learned Advocate-General, for the defence contends that we must have regard to the express wording of the Act and that the words 'making of the order' are too distinct to admit of any liberal construction. The answer is : no two construction are possible, the meaning I have suggested being the only reasonable construction of the words. The very word "order" by necessary implication means in law that the party affected has had reasonable notice of it. Not a single case in India has been brought to our notice which takes a different view. On the contrary every decision on the point seems to recognise the principle I have stated. That any particular ruling proceeds on the special provision of any Act makes, in my opinion no difference *Abdul Ali* v. *Mirj.khan*[1], is a case under section 77, Registration Act and is directly in point. The same rule has been laid down without equivocation in *Annamalai* v. *Cloete*[2], *Seethamma* v. *Bankara*[3], *Secretary of State* v. *Gopisetti Narayanaswami*[4] and *Mahipat* v. *Lashman*[5] The essence of the rule is, that the decision should be passed in such circumstances that the parties should have reasonable notice of it. If when a petition is presented or a case is heard, the order is then and there made in the presence of the parties, no further question arises; if the making of the order is postponed, parties should be given notice of the adjourned date, so that they may be present and hear the decision when passed. If, in these two cases, the party owing to his own fault, does not become aware of the order, it nevertheless takes effect at once. If an order is made without previous notice, it does not become operative until it is communicated. These in my opinion are rules which are in conformity with justice and commonsense".

1. (1904) I. L. R. 26 Bom 8.
2. (1883) I. L. R. 6 Mad. 189.
3. (1889) I. L. R. 12 Mad. 1.
4. (1911) I. L. R. 34 Mad 151.
5. (1900) I. L. R. 24 Bom. 426.

The observation of Madhavan Nair, J., runs as follows :

"It is argued on one side that the expression 'making the order of refusal' in section 77, Registration Act, means only recording the order of refusal in writing and that the time should be calculated from the date of the 'order of refusal' in which case the plaintiff's suit will be out of time; while on the other side it is contended that the expression means not merely the recording of the order in writing by the Registrar but communicating it to the party concerned and that in this case time should be calculated from the date when the order was communicated to the plaintiff in which case his suit will be in time. The answer to the question must depend on the special circumstances of each case. If the order of refusal is pronounced in the presence of the parties immediately after inquiry by the Registrar, so that the person concerned knows that his request has been refused, then there can be no doubt that time should be calculated from the date of the order but if the order was not so pronounced and the person concerned does not know that his request has been refused, then it would not be just to hold that time should be calculated from the date of the order How is an aggrieved party to take any action unless he knows that an adverse order has been passed by the Registrar? If the construction contended for by the

appellant is accepted, then it is clear that in cases of this kind the party aggrieved may be altogether deprived of the privilege of taking proceedings under section 73 (1) and section 77 of the Act. It is not contended that the Sub-Registrar and the Registrar pronounced their orders in the presence of the parties after the inquiry was over, or that these officers fixed any day for pronouncing their orders or gave notice finding any date for pronouncing them. In these circumstances it seems to me that in this case time should be calculated only from the date when the order was communicated to the parties. An order to be valid under section 77 of the Act should be passed in the presence of the parties; or after notice to them; if no notice has been given, then it should be communicated to them; in other words the order to be a valid one must be brought to the knowledge of the party against whom it has been passed. It is conceded that there is no provision in the Act for communicating the orders of the Registrar and Sub-Registrar to the parties concerned. It seems to me therefore that the intention of the Act is that the officers should pronounce their orders in the presence of the parties after the inquiry is over or should do so, after giving the parties notice".

8. In *Chandu* v. *Mast Ram*[1], the judgment was not communicated till a particular date and it was held that the period of limitation for the appeal must be reckoned from the date of communication.

9. In *Mohammad Zaman* v. *Hans Raj*[2], the Trial Court delivered judgment without having previously fixed a date for the same; the defendant was absent and the judgment was intimated to his counsel on some later day and limitation for appeal was held to run from the day on which the counsel for the defendant was informed of the judgment.

1. A. I. R. 1934 Lah. 135.
2. A. I. R. 1938 Lah. 707.

10. In *Venkataswami* v. *Ganapathia*[1], Ramaswamy, J., was dealing with a case arising under the provisions of section 75 (4) of the Provincial Insolvency Act, 1920. Following the observations of the Division Bench in *Swaminathan* v. *Lakshmanan*[2], the learned Judge held that a person can become aggrieved only when the act by reason of which the grievance arises comes to his knowledge; the better and more commonsense view seems to be that in the case of parties to the proceeding the 30 days would be from the date of the order because they would have known of its pronouncement and in the case of third parties the starting point would be the date of Gazette notification which would fix him with knowledge of the order passed by the Court.

11. In *Harish Chandra* v. *Deputy Land Acquisition Officer*[3], the expression "the date of the Collector's award" occurring in section 18 (2), Proviso (*b*) of the Land Acquisition Act, 1894, came up for interpretation and the Supreme Court held that the date means date of award either communicated to or is known by the party whether actually or constructively.

12. In *State of Punjab* v. *Mst. Qaisar Jehan Begum*[4], the Supreme Court was concerned with the provisions of section 18, Proviso (*b*) of the Land Acquisition Act, 1894 and the expression "six months from the date of the Collector's award" came up for consideration and they referred to the ratio of the decision in *Harish Chandra* v. *Deputy Land Acquisition Officer*[3], that the party affected by the award must know it actually or constructively and the period of six months will run from the date of that knowledge. It has been further held as follows :

1. (1952) 1 M. L. J. 765: 65 L. W. 448: A. I. R. 1953 Mad. 465.
2. (1930) 59 M. L. J. 585: A. I. R. 1930 Mad. 490.
3. (1962) 1 S. C. J. 696: (1962) 2 An. W. R. (S. C.) 10: (1962) 2 M. L. J. (S. C.) 10: (1962) 1 S. C. R. 676: A. I. R. 1961 S. C. 1500
4. (1964) 1 S. C. J. 33: (1964) 1 M. L. J. (S. C.) 9: (1964) 1 An. W. R. (S. C.) 9: (1964) 1 S. C. R. 971: A. I. R. 1963 S. C. 1604.

"Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under section 12 (2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in Court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award".

13. A similar view has been taken by the Delhi High Court in *Gian Chand* v. *Union of India*[1], following the dictum of the Supreme Court in *Harish Chandra* v. *Deputy Land Acquisition Officer*[2].

14. The above authorities amply support the view which I have expressed earlier that where the provisions in a statute governing the pronouncement or passing of orders by the authorities constituted thereunder are silent as to the manner in which they should be pronounced or passed, in the absence of such pronouncements or passing of orders in the presence of parties or their authorised representatives the time stipulated under the relevant provisions for agitating over such orders can be computed only from the date of the communication of the order or knowledge of the order either actually or constructively. Viewed, in this angle, no exception could be taken to the view taken by the lower Appellate Court that the suit filed by the plaintiff is within time.

In the said circumstances, there is no warrant for interference and the Second Appeal fails and the same is dismissed. But, there will be no order as to costs,

1. A. I. R. 1976 Del 83.
2. (1962) 1 S. C J 696 : (1962) 2 An. W. R (S. C.) 10 : (1962) 2 M. L. J. (S. C.) 10 : (1962) 1 S. C R. 676 : A. I. R. 1961 S. C. 1500.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, CJ.* and *M. A. Sathar Sayeed, J.*

C. R. Ramaswami ... *Appellant**

v.

Messrs. Needle Industries (I) Ltd. and another ... *Respondents.*

Tamil Nadu Shops and Establishments Act (XXXVI of 1947), section 41 — Resignation of employee — Resignation accepted — Subsequent allegation by employee that resignation was obtained by management by coercion and threat —Appeal by employee before Appellate Authority—Appeal not maintainable.

One '*R*' was employed in '*N & Co.* '*R*' submitted his resignation on 12th January 1979 and this was accepted on the same date. The accounts of *R* were settled. Subsequently on 20th January, 1979 '*R*' wrote to '*N & Co*', that the letter of resignation dated 12th January, 1979 was obtained from him by coercion and threat. Then he filed an appeal to the Appellate Authority under section 41 (2) of the Tamil Nadu Shops and Establishments Act, 1947. At that stage '*N & Co*', filed a writ petition for a writ of prohibition against the Appellate Authority from entertaining the appeal of '*R*'. This petition was allowed and '*R*' filed a writ appeal. The question for consideration was whether the expression 'employer shall dispense with the services of a person employed' will take in the case of an employer relieving an employee on the basis of a letter of resignation sub-

* W. A. No. 738 of 1980. *17th December, 1980.*

mitted by him, if he subsequently contends that the letter of resignation was obtained from him under coercion or threat.

Held: Having regard to the language of sub-sections (1) and (2) of section 41 of the Tamil Nadu Shops and Establishments Act the said section cannot comprehend such a case. [*Para.* 4.]

The Appellate Authority is a creature of the statute and any power which he can exercise has to be traced to the statutory provisions which had created him and conferred powers on him. Having regard to the language of section 41 (1) and (2) there must be first an action on the part of the employer dispensing with the services of an employee and if that action is absent, there is no question of a person like the appellant filing an appeal under section 41 (2).

The foundation for invoking the jurisdiction under section 41 (2) is the fact that the first respondent should have dispensed with the services of the appellant. When the appellant sent his resignation letter he requested the first respondent to relieve him on that date itself and the first respondent accepted the resignation letter and relieved him from his duties. Certainly that will not constitute the employer dispensing with the services of the employee, the appellant. [*Para.* 3.]

Cases referred to —

Lakshmi Vil. Bank Ltd. v. *Pattabhi Chettiar*, (1980) 2 Lab. L. J. 211; *M/s. Southern Roadways Ltd.* v. *Padmanabhan*, (1922) Lab. I. C. 234: 5! F. J. R. 90.

Appeal under Clause 15 of the Letters Patent against the order of Mohan, J. in W. P. No. 5141 of 1980 dated 28th October, 1980.

M/s. Row and *Reddy*, for Appellant.

The Judgment of the Court was delivered by

Ismail, CJ.—This is an appeal against the order of Mohan, J. dated 28th October, 1980 allowing W. P. No. 5141 of 1980, filed by the first respondent herein. For the purpose of understanding the prayer in the writ petition, it is necessary to refer to only a few facts. Admittedly, the appellant herein was the employee of the first respondent. On 12th January, 1979, he wrote a letter addressed to the Secretary of the first respondent as follows—

> "I shall be thankful if you will kindly relieve me from services from 12th January, 1979. This may be treated as a formal letter of resignation from me."

On 12th January, 1979, itself the first respondent wrote the following letter addressed to the appellant—

> "We are in receipt of your letter of today's date tendering your resignation from the services of our company. Your resignation has been accepted and in view of your special request we are pleased to enclose herewith cash of Rs. 2,960 representing two months' salary for notice period."

Thereafter, the accounts of the appellant were settled. However, on 20th January, 1979, the appellant wrote to the first respondent herein stating that the letter of resignation, dated 12th January, 1979, was obtained from him by coercion and threat. Then the appellant purported to file an appeal before the second respondent herein under section 4 (2) of the Tamil Nadu Shops and Establishments Act, 1947. At that stage, the first respondent herein filed the present writ petition praying for the issue of a writ of prohibition prohibiting the second respondent from proceeding further with the hearing of the appeal or incidental matter filed by the appellant herein under section 41 of the Tamil Nadu Shops and Establishments Act, 1947. The case of the first respondent was that on the facts of this case, the second respondent had no jurisdiction to entertain the appeal purported to have been filed by the appellant herein and deal with the same.

Mohan, J., allowed the writ petition holding that the second respondent had no jurisdiction to entertain the appeal purported to have been preferred by the appellant herein and deal with the same. It is against this order of Mohan, J., the present writ appeal has been preferred.

2. Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 reads as follows: —

"*Notice of dismissal*.—(1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice provided, however, that such persons are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose:

(2) The person employed shall have a right of appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held of the employer.

(3) The decision of the appellate authority shall be final and binding on both the employer and the person employed."

Thus, merely from a reading of the section it is clear that sub-section (1) contemplates an employer dispensing with the services of a person employed, and sub-section (2) contemplates the said person employed after such dispensing with his services preferring an appeal before the second respondent herein on the ground that there was no reasonable cause for dispensing with his services on the ground that he had not been guilty of misconduct as held by the employer. Consequently, before section 41 (1) can be invoked the employer must have dispensed with the services of the person employed and sub-section (2) merely follows sub-section (1) and consequently, any appeal that may be preferred under sub-section (2) must be based upon the employer dispensing with the services of the person employed, and there, being no reasonable cause for such action or the employee not being guilty of misconduct as held by the employer. In the present case as we have pointed out already, the appellant herein was relieved from his post in the service of the first respondent not on the basis of any initiative taken by the first respondent to dispense with the services of the appellant, but at the request of the appellant himself who tendered his resignation on 12th January, 1980. The contention is that even though the resignation letter was admittedly submitted by the appellant herein and pursuant to that letter he was relieved from the services on that date itself, still, in view of the stand taken by the appellant herein that the letter was obtained from him by coercion and threat, it will amount to the employer dispensing with the services of the appellant and consequently, the Appellate Authority, namely, the second respondent has jurisdiction to go into that question in the appeal preferred by the appellant herein. We are unable to accept the contention. The second respondent is a creature of the statute and any power which he can exercise has to be traced to the statutory provisions which had created him and conferred powers on him. We have already indicated that having regard to the language of sections 41 (1) and 41 (2) there must be first an action on the part of the employer dispensing with the services of an employee and if that action is absent, there is no question of a person like the appellant filing an appeal under section 41 (2) of the Tamil Nadu Shops and Establishments Act, 1947, in fact, the foundation for invoking the jurisdiction of the second respondent under section 41 (2) is the fact that the first respondent has dispensed with the services of the appellant. When the appellant sent his resignation letter, he requested the first respondent to relieve him on that date itself and the first respondent accepted the resignation letter and relieved him from his duties. Certainly, that will not constitute the

employer, normally the first respondent herein, dispensing with the services of the employee, namely, the appellant herein.

3. However, strong reliance was placed before the learned Judge as well as before us on a decision of one of us reported in the *Lakshmi Vilas Bank Ltd.* v. *Pattabhi Chettiar*[1]. In that case, the question that arose for consideration was when an employee had been retired from service on the basis that he had attained the age of superannuation, whether the Appellate Authority under section 41 (2) of the Tamil Nadu Shops and Establishments Act, 1947, had jurisdiction to entertain any appeal by the retired employee. In that context, after referring to the statutory provision and the obligation imposed upon the employer to dispense with the services of an employee only for a reasonable cause after holding an enquiry into the misconduct of the person employed, the judgment pointed out :

"It may happen in a particular case, the retirement was used by the employer as a cloak for dispensing with the services of an employee where the motive for dispensing with the services was something different. In that event, a different position may possibly result because no person will be allowed to evade the obligation imposed on him by law by having recourse to a cloak or guise under which he can take refuge in order to escape from such an obligation."

We are of the opinion that the above observation has no bearing on the point that arises for consideration in this particular case, Even in that case the initiative came from the employer by retiring the employee and it was not concerned with the present case of resignation by the employee himself, In such a context, we are of the opionion that the said decision is not of any assistance whatever to the appellant herein.

Another decision, on which reliance was placed before the learned Judge as well

1. (1980) 2 L. L. J, 211.

as before us, is *M/s. Southern Roadways Ltd.* v. *Padmanabhan*[1]. That case was concerned with the jurisdiction of the Government to refer a dispute to the Labour Court under section 2-A of the Industrial Disputes Act, 1947. The said section reads as follows: —

"2-A. Where any employer discharges, dismisses, retrenches, or otherwise terminates the services of an individual workman any, dispute or difference between that workman and his employer connected with, or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute".

The question that came to be considered by the Karnataka High Court in that case was whether the expression 'otherwise terminates the services of an individual workman' ocurring in section 2-A will take in a case where an employee contends that his resignation was obtained by force. The Karnataka High Court held that the expression 'otherwise terminates the services of an individual workman' was wide enough to take in such a case. The learned Judge, Mohan, J., expressed his disagreement with that view, but at the same time pointed out—

"Nonetheless, it is not for me to examine whether some other interpretation on the language of section 2-A of the Industrial Disputes Act is permissible, because no such language occurs in section 41 of the present Act (Tamil Nadu Shops and Establishments Act, 1947)—

We are of the opinion that section 2-A of the Industrial Disputes Act, having regard to the language in which it was couched and the context in which it was enacted, cannot be of any assistance whatever to

1. (1979) Lab. I. C 234 : 53 F. J. R. 90.

the appellant in the present case. Here, we are considering only one question, namely, whether the expression 'employer shall dispense with the services of a person employed' will take in the case of an employer relieving an employee on the basis of the letter of resignation submitted by him, if he subsequently contends that the letter of resignation was obtained from him under coercion or threat. We are of the opinion that having regard to the language of sub section (1) and (2) of section 41, the said section cannot comprehend such a case.

5. Lastly, the learned Judge has pointed out—

> "There is some force in the contention of Mr. Govind Swaminathan, that if jurisdiction were to be denied to the appellate authority in this cast, frequent resort to this questionable method will be had by the employers and thereby deprive the employee of the benefit of the social welare legislative measures. But it is a matter in which the Legislature must bestow its urgent atteation and it is worthwhile to remember that Courts are to interpret law on the plain language of the statute not to legislate".

Though we agree with this observation of the learned Judge, we may also point out that the moment it is held that section 41 (2) of the Shops and Establishments Act, 1947, does not apply to a particular case, the employee is not without any remedy and the remedy in a civil Court is always open to him. Under these circumstances, the appeal fails and is dismissed.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

State Trading Corporation of India (Agricult ral, Production Divn.), New Delhi within the jurisdiction of the District Court, New Delhi and branch office at 123 Mount Road, Madras-6
.. *Appellant**

v.

M/s. S.S. Mohte and Company registered firm of partnership by managing partner Sri Suraj Chand Motin and another
.. *Respondents.*

Civil Procedure Code (V of 1908), *section* 20—*Suit for return of deposit or earnest money —Goods stored at Bombay—Tenders invited by main office at Delhi—Tender submitted from Madras—Tender accepted in Delhi—Cause of action arises in Delhi and not in Madras.*

The State Trading Corporation of India, New Delhi (S.T.C.) invited tenders for the sale of nutmegs with shell and without shell, maco and betelnuts. The plaintiff from Madras submitted its tender along with a demand draft for 10% of the value of the goods as deposit. The plaintiff's tender was accepted in respect of nutmegs without shell which were stored at Bombay. The S.T.C. returned the balance of deposit after retaining Rs. 26,409.65 in respect of the accepted quantity of tender. The S.T.C. demanded sales tax as a condition precedent for giving delivery of the goods. The plaintiff protested and made payment exclusive of sales-tax. This was not accepted. The plaintiff thereafter tendered payment inclusive of sales tax which was not accepted as out of time. Apart from rejecting the payment, the S.T.C. refused to refund the deposit stating that the amount had been forfeited. The plaintiff filed a suit in the City Civil Court at Madras for the return of the deposit. It was contended by the S.T.C. that the City Civil Court had no jurisdiction. However the trial Court took the view that the invitation to tender was itself an offer and this was accepted in Madras and therefore part of the cause of action

* Appeal Nos. 159 and 507 of 1976
23rd June, 1980.

arose at Madras. The trial Court further held that the plaintiff committed breach of trust and that the S.T.C. was entitled to a reasonable compensation. Thus after adjusting Rs. 12,000, the plaintiff was granted a decree for Rs. 16,408.65. Against this both the plaintiff and S.T.C. filed appeals. The S.T.C. contended that the City Civil Court had no jurisdiction.

Held : the contract was made in New Delhi and the delivery had to be made in Bombay where the goods were located. Therefore, there was no question of any contract having been entered in Madras or any course of action having arisen here. The conclusion of the learned Judge on this point was clearly erroneous.

[*Para.* 9.]

The cause of action in the present case was the non-payment of the amount paid as advance or earnest. The amount was paid in New Delhi where it was received and the cause of action for its return had necessarily to be at that place.

[*Para.* 7.]

The legal position is well-established that the existence of a subordinate office cannot give rise to jurisdiction unless the cause of action at least in part arose at that place.

[*Para.* 8.]

The result is that the City Civil Court would not have jurisdiction to entertain the suit.

[*Para.* 10.]

Cases referred to :—

Manilal v. *Venkatachalapathi*, (1921) I.L.R. 44 Mad. 95; *Baroda Oil Orchers Traders* v. *Parshottam*, (1954) 56 Bom. L.R. 575; *Venkatesa Bat* v. *Kamalapat Motilal*, A.I.R. 1957 Mad. 201; *Bharat Insurance Company* v. *Wasudeo Ramachandra*, A.I.R. 1956 Nag. 203; *Hindustan Co-operative Insurance Company Limited* v. *Nathu*, (1941) Nag L.J. 37; *Kamala Chopa* v. *Life Insurance Corporation of India*, A.I.R. 1975 Delhi 115; *Nedungadi Bank* v. *Central Bank of India*, A.I.R. 1961 Ker. 50; *Raman Chettiar* v. *Gopalachari*, (1911) I.L.R. 34 Mad. 233; *Galley and Company* v. *Appalasami Naidu*, (1946) 1 M.L.J. 11; A.I.R. 1946 Mad. 300.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 4534 of 1972 etc.

G. Narayanan and *K. P. Prakash*, for Appellant.

N. C. Raghavachari for *N. S. Varadachari*, *C. R. Pattabiraman* and *T. V. Ramanujam*, for Respondents.

The Court delivered the following

JUDGMENT : These two appeals arise out of the judgment of the learned Fourth Assistant Judge, City Civil Court, Madras, in O.S. No. 4534 of 1972. The plaintiff submitted its tender in response to an advertisement issued by the first defendant, for purchase of four items of Nutmegs with shell, Nutmegs without shell, Mace and Betelnuts. The total amount for which the plaintiff tendered came to Rs. 4,44,867. The plaintiff sent a demand draft for Rs. 44,487 being ten per cent of the value of the goods agreed to be purchased by him. The first defendant accepted the plaintiff's offer in relation to the second item, namely Nutmegs without shell, which was stored at Bombay. Out of this amount Rs. 26,409.65 due as and by way of deposit relating to the accepted quantity of the tender was retained and the balance was refunded. As a condition precedent for taking delivery of the goods, sales-tax was demanded by the first defendant and the plaintiff protested that it was contrary to the terms of the tender. Therefore, by a telegram, the plaintiff informed the first defendant that it was tendering the balance amount of price under protest on the ground that 40per cent. of the goods were deteriorated and became unfit for human consumption. The plaintiff's partner delivered a bank draft for a sum of Rs. 2,20,409.50 exclusive of sales-tax, under protest, and requested for delivery orders. This draft was returned to the plaintiff by the first defendant stating that the amount offered under protest could not be accepted. Thereafter, the plaintiff tendered a sum of Rs. 2,23,449.10 by bank draft which was inclusive of sales-tax and requested for delivery orders. This Bank draft was also returned on 26th September, 1969, as the amount had not been tendered in time, and the quantity was not, therefore, delivered. Apart from rejecting the bank draft on the ground that it had not been tendered within time, the first defendant refused to refund the balance of Rs. 26,498.65 stating that the

amount had been forfeited on account of failure of the plaintiff to lift the stock. The plaintiff came forward with the present suit stating that the first defendant could not forfeit the deposit and that ,amount was liable to be returned. In the suit, the plaintiff impleaded not only the first defendant, the State Trading Corporation of India, but also the Union of India. In the written statement of the first defendant it was contended that no part of the cause of action arose at Madras, as the goods were stored at Bombay and they had to be taken delivery at Bombay. It was also contended that the tender was accepted only at Delhi. It was also contended by the first defendant that a sum of Rs. 26,499.65 was properly forfeited in accordance with the terms of the tender, which was accepted by the first defendant. The trial Court framed the following issues:

1. Whether the plaintiff is entitled for the recovery of the balance amount paid by way of earnest money?

2. Whether the plaintiff has committed breach of contract as contended by the defendant?

3. Whether this Court has no jurisdiction to entertain the suit?

4. To what relief?

2. The trial Court took up for consideration issue No. 3 relating to jurisdiction. It took the view that the invitation for a tender is in itself an offer and that the plaintiff has accepted the offer to purchase the goods in Madras as shown by Exhibit B-2 and, that therefore, part of the cause of action arose at Madras. The issue relating to jurisdiction was accordingly answered in favour of the plaintiff. The trial Court further held that the plaintiff had committed breach of trust in not lifting the goods within the time stipulated, that the defence regarding payment of sales tax was not accepted and that the first defendant was entitled to reasonable compensation fixed at Rs. 10,000 and after adjusting the sum of Rs. 12,000, the plaintiff was granted a decree for Rs. 16,408.65. The first defendant has filed A.S. No. 159 of 1976 contending that the total amount of Rs. 27,498.65 could have been forfeited and that the Court below was wrong in holding that the first defendant was entitled to the compensation of Rs. 10,000. The plaintiff has filed App. No. 506 of 1976 contesting the decree being granted only to the extent of the sum of Rs. 10.000.

3. The learned counsel for the Appellant (defendant) in A.S.No.159 of 1976, submitted that the City Civil Court had no jurisdiction to entertain the suit and that the decree granted was, therefore, a nullity. It was also contended that the first defendant was entitled to forfeit the entire amount that was paid as earnest money in accordance with the terms of the invitation for the tender.

4. Section 20, Civil Procedure Code, in so far as it is material runs as follows:

> "Subject to the limitations set out, every suit shall be instituted in a Court within the local limits of whose jurisdiction—
>
> (*a*) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain provided that in such case either the leave of the Court is given or the defendants who do not reside, or carry on business or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (*c*) the cause of action, wholly or in part, arises.
>
> *Explanation* I, omitted by Act CIV of 1976.
>
> *Explanation* 2-A.—A Corporation shall be deemed to carry on business at its sole or principal office in India or in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

In the present case it is not in dispute that the State Trading Corporation has its registered office in New Delhi. It has only a branch or subordinate office in Madras. It is not in dispute that the Branch office did not have anything to do with the transactions under consideration. On those facts the matter has to be considered either in the light of clause (*c*) of section 20 or the *Explanation*.

5. It may first be considered as to whether the cause of action in part arose within the jurisdiction of the City Civil Court. The tender in this case

was invited by advertisement in the newspapers. These tenders were required to be submitted to the first defendant's office at New Delhi and the first defendant accepted the tender only in New Delhi. The goods were stored in Bombay, and they were liable to be delivered only in Bombay. Thus, no part of the cause of action arose within the jurisdiction of the City Civil Court. The City Civil Court has taken the view that the invitation or tender is an offer, and that the submission of the tender was an acceptance of the offer in Madras. It was, therefore held in effect that the contract was entered into in Madras and that therefore, the City Civil Court had jurisdiction to entertain the suit.

6. A somewhat similar question came up for consideration by this Court in *Manilal* v. *Venkatachalapathi*[1]. In that case, Venkatachalapathi, was carrying on business in Madura and Manilal in Bombay. On 7th September, 1940, Venkatachalapathi wrote to Manilal offering to purchase certain goods and the offer was accepted at Bombay. The question for consideration by this Court was whether the Court in Madura had jurisdiction to entertain the suit filed by Venkatachalapathi against Manilal, the Bombay party. It was held:—

> "A contract is made at the place where the offer is accepted. In accordance with English authorities this Court has held that an offer when accepted by post is accepted at the place where the letter of acceptance is posted and therefore, the cause of action arises there".

A large number of decisions of Benches of this Court has been cited in support of the above proposition. A contrary view had been taken by two learned Judges sitting singly and those decisions were overruled as wrong. This decision was followed by a Bench of the Bombay High Court consisting of Gajendragadkar, J., as he then was and Vyas, J. in *Baroda Oil Orchers Trades* v. *Parshottam*[2]. In the case before the Bombay High Court the plaintiff sent a telegram from Baroda offering to purchase certain goods from defendants who were in Kanpur. The defendants accepted the offer by telegram, despatched from Kanpur. The plaintiff filed the suit in the Baroda Court against the defendant for damages for breach of the contract. On the question whether the Baroda Court had jurisdiction, it was held that no part of the cause of action had arisen in Baroda as the offer was made at Kanpur and the acceptance was made at Kanpur and that the whole of the contract was made at Kanpur, and that, therefore, the Baroda Court had no jurisdiction to try the suit. The learned Judges pointed out at page 580 that—

> "When a civil Court deals with the question as to where the contract is made, it must decide that question in the light of the provisions relating to the making of contract and therefore, the decision of the question as to whether the trial Court had jurisdiction must necessarily imply the decision of the question as to where the contract was made in the light of the provisions of section 4 of the Indian Contract Act".

It was further pointed out that under section 4, the proposal which was made became complete only when its communication came to the knowledge of the person to whom it was made and that unless the proposal was communicated to the person to whom it was made, it was not complete and in that sense was inchoate and inconclusive. On this basis only when the proposal reached Kanpur, it was complete and, so far as acceptance was concerned, it was pointed out that under section 4, the communication of an acceptance was complete as against the proposer, when it was put in the course of transmission to him so as to be out of the power of the acceptor and that it necessarily meant that as soon as the acceptance was posted or a telegram to that effect was sent, the acceptance was complete against the proposer, and so far as the proposer was concerned, the contract was concluded at that time. Even if the acceptance did not reach the proposer on account of its loss in transit, the contract would still be complete and for its breach, the proposer would be entitled to sue in damages. This position has again been reiterated in *Venkatesa Bat*

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1. (1921) I.L.R. 44 Mad. 95.
2. (1954) 56 Bom. L.R. 575.

v. *Kamalapat Motilal*[1] (paragraph 11 of the said judgment).

7. The result is that in the present case, the contract was made in New Delhi and that the delivery has to be made in Bombay where the goods were located. Therefore, there is no question of any contract having been entered in Madras or any cause of action having arisen here. The conclusion of the learned Judge on this point is clearly erroneous.

8. The question that next arises for consideration is whether the situation of the subordinate office at Madras, of the first defendant Corporation gave jurisdiction to the City Civil Court, to try the suit. In *Bharat Insurance Company* v. *Wasudeo Ramachandra*[2], the Nagpur High Court considered maintainability of a suit in Nagpur with reference to a policy of insurance effected with a company having the head office at Delhi. The proposal for the policy was made at Delhi and was accepted at Delhi. The money was also payable to the nominee at Delhi. The assured died at a place in Hyderabad State. The nominee brought a suit at Nagpur where the company had a branch office. A Division Bench of the Nagpur High Court held that the Court at Nagpur had no jurisdiction to entertain the suit. The learned Judges referred to the decision of a single Judge in *Hindustan Co-operative Insurance Company Limited* v. *Nathu*[3], wherein it was held that the Court had jurisdiction over a similar claim for the insurance amount. It was observed by Bhatt, J., in an earlier case as follows :—

> "The necessary condition contemplated by the second explanation to section 20 is that the cause of action in respect of which the suit is brought should arise at the place where the Corporation has its subordinate office.
>
> In other words, a corporation can be sued at a place where it has a subordinate office on the ground that it carries on its business there only in respect of a cause of action arising at such a place".

1. A.I.R. 1957 Mad. 201.
2. A.I.R. 1956 Nag. 203.
3. (1941) Nag. L.J. 37.

Reference was made to several decisions of other High Courts bearing on the point. It was further observed in paragraph 7 of the same judgment of the Nagpur High Court as follows :

> "In view of clause (*a*) of section 20, Civil Procedure Code, a corporation can be sued where it carries on its business and under clause (*c*) it can always be sued at the place where the cause of action, wholly or in part arises. By reason, however, of the *second Explanation* in the section, a corporation is deemed to carry on business at its sole or principal office in India, or, in respect of any cause of action arising at any place where it has also a subordinate office at such place.
>
> The result of the *Explanation* is to restrict the meaning of 'carries on....business; 'in clause (*a*) in relation to corporations. A corporation can be sued at its sole or principal office in India. At any place where it has a subordinate Office, it can be sued only in respect of a cause of action arising at such a place.... However, where the suit is instituted at a place where a Corporation maintains a subordinate office, the Court cannot dispense with the requirements that the cause of action must arise at such a place. The decision in *Hindustan Co-operative Insurance Company* v. *Nathu*[1], having altogether ignored the second *Explanation*, cannot be supported and must be overruled."

This decision has subsequently been followed in *Kamala Chopa* v. *Life Insurance Corporation of India*[2]. The decision of the Kerala High Court in *Nedungadi Bank* v. *Central Bank of India*[3], is also to the same effect. Thus, the legal position is well established that the existence of a subordinate office cannot give rise to jurisdiction unless the cause of action arose at least in part at that place.

9. The cause of action in the present case was the non-payment of the amount paid as advance or earnest. The amount was paid in New Delhi where it was received and the cause of action for its return has necessarily to be at that place.

1. (1941) Nag. L.J. 37.
2. A.I.R. 1975 Delhi 15.
3. A.I.R. 1961 Ker. 50.

10. Mr. N. C. Raghavachari, learned counsel for the plaintiff, however, submitted that the cause of action could be said to have arisen in Madras because the debtor was bound to trace out and make payment at the place of the creditor and that in the present case the payment had to be made only in Madras where the creditor resided. For this purpose, he referred to the decision in *Venkatesa Bhat* v. *Kamalapet Motilal*[1]. I do not find that this case can be said to support the contention of the learned counsel for the plaintiff. At page 205 after referring to the decision of this Court in *Raman Chettiar* v. *Gopalachari*[2] wherein it was held that the common law rule that the debtor is bound to find the creditor for making payment, did not control the express provisions in *Explanation III* to section 20, Civil Procedure Code, and that the place of payment in order to give jurisdiction must be where the money is payable expressly or impliedly under the contract itself and not under any general rule of law, it was observed in paragraph 19 as follows :

> "Though this decision was under the old Code, this Court has again expressed the same view in *Galley and Company* v. *Appalasami Naidu*[3] wherein it has been pointed out that there has been a pronounced disinclination on the part of the Indian Courts to apply to this country unreserved by the English common law maxim that a debtor should find and pay his creditor and that generally speaking the place of payment has to be determined independently of any such general maxim with reference to the terms of the contract, the circumstances attending on it, the necessities of the case and having regard also to the statutory provision contained in the Civil Procedure Code and in section 49 of the Contract Act."

It is not, therefore, possible to accept that this decision in any manner, supports the theory that the general maxim that the debtor is bound to find the creditor for making the payment, is applicable to a case like this. The result is that the City Civil Court would not have jurisidiction to entertain the suit.

11. The trial Court has gone into the merits of the claim. I do not want to go into the merits of the claim and the findings on merits are discharged. Necessarily, the plaint will have to be returned to the plaintiff for presentation to the proper Court. The judgment and decree of the trial Court are set aside. Appeal No. 159 of 1976 is accordingly, allowed. In the view that I have taken namely, that the City Civil Court had no jurisdiction to entertain the suit, there is no question of the plaintiff getting a decree for the full amount in the suit filed in the City Civil Court. The decree itself having been set aside in the connected appeal App. No. 507 of 1976 will stand dismissed (corrected in open Court on 23rd June, 1980, when the matter was posted). There will be no order as to costs in both the appeals.

S.J. —— *Appeal No.* 159 *of* 1976 *allowed.* *Appeal No.* 507 *of* 1976 *dismissed.*

1. A.I.R. 1957 Mad. 201.
2. (1911) I.L.R. 34 Mad. 233.
3. (1946) 1 M.L.J. 11. A.I.R. 1946 Mad. 300.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—*S. Padmanabhan, J.*

A. Ramaswamy Iyer .. *Petitioner**

v.

The Management of Bhuvaneswari Pulverising Mills, Madras and another.

.. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10—Receiver—Termination of services of worker by receiver—Failure of conciliation—Industrial dispute raised—Leave of Court appointing receiver not obtained by worker—Leave not necessary.

It is a settled principle of civil law established by practice that the receiver, being an officer of Court, leave of the Court was necessary to warrant institution of proceedings against him. The rule requiring leave to sue a receiver is not based on any statutory authority, but has its origin and reason on considerations of public policy. [*Para.* 5.]

There is no provision in the Industrial Disputes Act, which makes it incumbent upon a workman to obtain the leave of the Court which appointed the receiver where the concerned employer is a receiver appointed by a civil Court. Further, the power to make an order of reference is conferred on the appropriate Government under section 10 of the Act. The power to refer or not to refer a dispute for adjudication by a Labour Court or Industrial Tribunal is a discretionary power vested in the appropriate Government. So long as there is no statutory provision in the Industrial Disputes Act, that before an order of reference is made under section 10 of the Act, the Government or the workman concerned is bound to obtain the leave of the Court which appointed the receiver, no such condition can be incorporated into the Act. To hold otherwise, would in effect mean that the Court which appointed the receiver will have, the discretion to decide whether a particular industrial dispute should be referred for adjudication or not before the Labour Court. [*Para.* 6.]

When once the appropriate Government is satisfied that there is an industrial dispute, it is the duty of the appropriate Government to refer the dispute for resolution by the Labour Court or the Industrial Tribunal. Such a power which is conferred on the Government under the provisions of a special statute, *viz.*, the Industrial Disputes Act, in the interest of industrial peace and harmony cannot in any manner be said to be controlled by any general principles of law that the leave of the Court which appointed the receiver should be obtained before instituting any proceeding against the receiver. The enquiry before the Labour Court under the Industrial Disputes Act, on a reference under section 10 of the Act cannot be said to be an enquiry initiated by a party against the receiver or against the property in the hands of the receiver.

[*Para.* 8.]

Cases referred to:—

Broja Bhusan v. *Srischandra,* 47 Cal. 719; *Sree Meenakshi Mills Ltd.* v. *State of Madras,* (1951) 2 L.L.J. 194; *Price* v. *Chandrasekharan,* (1951) 2 M.L.J. 185: 64 L.W. 705: A.I.R. 1951 Mad. 987; *Pontypridd etc.,* In re: *Tramways Co.,* (1889) 58 L.J. Ch. 536; *B. V. John* v. *Coir Yarn and Textiles Ltd.,* A. I. R. 1960 Ker. 247; *Governor-General in Council* v. *Shiramani Sugar Mills Ltd.,* (1945) 2 M.L.J. 486: 72 I.A. 305: 59 L.W. 9: A.I.R. 1946 P.C. 16; *S. K. G. Sugar Ltd.* v. *Ali Hassan,* A.I.R. 1957 Pat. 722.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorariy* calling for the records in proceedings dated 3rd May, 1977 in I.D. No. 226 of 1975 on the file of the Additional Labour Court, Madras, the 2nd respondent herein, and quashing the same.

M.N.Padmanabhan, for Petitioner.

N.Krishnamurthi and *Mohideen Singh,* for Respondents.

* W.P. No. 2992 of 1977.

23rd June, 1980.

The Court made the following

ORDER.—The petitioner was employed as a general assistant in the Bhuvaneswari Pulversing Mills, a partnership firm from 11th September, 1973 on a monthly salary of Rs. 250 which was subsequently raised to Rs. 300 per month. In 1974 one of the partners of the firm filed O.S.No.4710 of 1974 on the file of the City Civil Court, Madras for dissolution and rendition of accounts. Pending disposal of the suit, an advocate-receiver was appointed to manage and carry on the business of the firm.

2. On 31st March, 1975 the advocate-receiver without any justification terminated the services of the petitioner with effect from the 1st April, 1975 on ground of economy. However the receiver employed one Rengachari after terminating the services of the petitioner.

3. The petitioner then took up the matter with the Labour Officer, Madras, who initiated conciliation proceeedings. Conciliation having failed, the Labour Officer sent his failure report to the Government of Tamil Nadu. Thereafter, the Government in exercise of the powers conferred on it under section 10 (1) (*c*) of the Industrial Disputes Act, referred the question of the non-employment of the petitioner for adjudication by the Labour Court, Madras. The dispute was taken on the file of the Additional Labour Court, Madras as I.D.No.226 of 1975. The Labour Court passed an award on 3rd May, 1977. It was contended on behalf of the management before the Labour Court that the petitioner was not a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act, and that the termination of the services of the petitioner was as a matter of retrenchment. A further contention was also raised that the petitioner had not obtained the leave of the Court which appointed the receiver for raising the industrial dispute. The Labour Court found that the petitioner was a workman and that the provisions of section 25 (*f*) of the Industrial Disputes Act, regarding payment of wages in lieu of notice and compensation at the time of retrenchment had not been complied with and that consequently the order of termination of the services of the petitioner was null and void. However, the Labour Court held that the petitioner was not entitled to any relief in view of the fact that the leave of the Court which appointed the receiver had not been obtained. In the circumstances, the petitioner has filed this writ petition to quash the said award passed by the Labour Court to the extent to which the Labour Court has held that he was not entitled to any relief.

4. The question that arises for consideration therefore is whether the petitioner was bound to obtain the leave of the Court which appointed the receiver before raising an industrial dispute.

5. It is settled principle of civil law established by practice that the receiver being an officer of Court leave of the Court was necessary to warrant institution of proceedings against him. The rule requiring leave to sue a receiver is not based on any statutory authority, but has its origin and reason on considerations of public policy. In *Broja Bhusam* v. *Srischandra*[1], Mullick, J., held:

> "There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore, the party contemplating such suit, is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority".

The test in such cases is whether the propoerty in the hands of the receiver is going to be affected.

6. Industrial Disputes Act, 1947 is a piece of legislation intended to secure speedy settlement of all industrial disputes arising between the employees and employers by peaceful methods and through the machinery of conciliation, arbitration and if necessary by approaching the Tribunal constituted under the Act. It is meant to protect workmen against victimisation by the employer and

1. 47 Cal. 719.

to ensure termination of industrial disputes in a peaceful manner. It is a piece of social legislation. In the words of Rajamannar, CJ., in *Sree Meenakshi Mills Limited* v. *State of Madras*[1]

> "the essential object of all recent labour legislation has been not so much to lay down categorically the mutual rights and liabilities of employer and employees as to provide recourse to a given form of procedure for the settlement of disputes in the interests of the maintenance of peaceful relations between parties, without apparent conflicts such as are likely to interrupt production and entail other dangers".

There is no provision in the Act which makes it incumbent upon a workman to obtain the leave of the Court which appointed the receiver where the concerned employer is a receiver appointed by a civil Court. Further, the power to make an order of refeence is conferred on the appropriate Government under section 10 of the Act. The power to refer or not to refer a dispute for adjudication by a Labour Court or Industrial Tribunal is a discretionary power vested in the appropriate Government. So long as there is no statutory provision in the Industrial Disputes Act, that before an order of reference is made under section 10 of the Act, the Government or the workman concerned is bound to obtain the leave of the Court which appointed the receiver, no such condition can be incorporated into the Act. To hold otherwise, would in effect mean that the Court which appointed the receiver will have the discretion to decide whether a particular industrial dispute should be referred for adjudication or not before the Labour Court. Such a position would result in defeating the provisions of section 10 and taking away the power conferred on the Goverrnment by the said section. In the circumstances, the right of the Government to refer an industrial dispute for adjudication before the Labour Court cannot in any manner be controlled by any general priciple of law which states that no suit or proceeding can be instituted against the receiver appointed by Court unless leave of the Court which appointed the Court is obtained. Further a statutory proceeding initiated under section 10 of the Industrial Disputes Act cannot be said to be a proceeding initiated against the receiver.

7. In this connection, it may be useful to refer to two decisions, one of this Court and the other of the Kerala High Court. The first decision is a Bench decision of this Court in *Price* v. *Chandrasekharan*[1]. The case related to the Andhra Paper Mills Co., Ltd. By reason of some agreement arrived at among the interested parties the debenture trustees were running the mills. On 24th May, 1947 the debenture trustees in possession of the mills put up a notice that the trustees had to close down the mills with a view to avoid further loss and that workmen and members of the staff would be paid the wages earned upto and including the 26th May, 1947. The mills were duly closed. Thereupon, at the instance of the workers the Government referred the matter for adjudication by the Industrial Tribunal. The Industrial Tribunal conducted an enquiry and passed an award on 16th August, 1947. On 22nd August, 1947 an application for winding up the company was filed and on 23rd September, 1947 the winding up order was passed by this Court. The workers filed a claim petition before the liquidator who rejected the same. An application under section 230 of the Indian Companies Act was filed and Panchapagesa Sastri, J., who heard the application allowed the application. The Official Liquidator then preferred an appeal. It was contended before this Court on the basis of section 171 of the Indian Companies Act, 1913 that when a winding up order had been made, or a provisional liquidator had been appointed, no suit or other legal proceeding should be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court might impose, and that that therefore, the Government should have applied to the winding-up Court for permission before the Government passed an order declaraing the award as binding on the parties. Rajamannar, CJ., speaking for the Bench rejected the contention on the ground that a declaration made by the Government under section 15 (2) of the Industrial Disputes Act could not be held to be a legal proceeding. The learned Chief Justice further added as follows :

1. (1951) 2 L. L. J. 194.

1. (1951) 2 M.L.J. 185 : 64 L.W. 705 : A.I.R. 1951 Mad. 987.

"Apart from this legal position we are of opinion that section 171 of the Indian Companies Act would have no application to enquiries, investigations and orders made either by Government or statutory bodies in exercise of statutory powers. In In re, *Pontyprid etc., Tramways Co.*[1] the corresponding provision in the English Act of 1862 was held not to apply to an enquiry under section 42 of the Tramways Act, 1842 on the ground that the statutory proceeding which was being taken was in no way a proceeding against the company. This contention must therefore fail."

8. The decision of Raman Nayar, J., as he then was in *B.V. John* v. *Coir Yarn and Textiles Limited*[2] dealt with the question whether section 446 of the Companies Act, 1956 would have application to proceedings pursuant to a reference under section 10 of the Industrial Disputes Act. The learned Judge observed as follows:—

"Section 446 of the Companies Act can have no application to proceedings pursuant to a reference under section 10 of the Industrial Disputes Act. Giving the term, other legal proceedings' appearing in sub-section (1) of the section, the wide meaning given to the same term in the corresponding section 171 of the 1913 Act in *Governor-General-in-Council* v. *Shiromani Sugar Mills Ltd.*,[3] and not confining it by an *ejusdem generis* contruction to proceedings analogous to a suit, I still think that to come within the scope of this section, the proceeding must be in the nature of an action against the property of the company".

Over again the learned judge observed:

"The Industrial Disputes Act, needless to say, is conceived in the public interest. Its object is to ensure fair terms to workmen and to secure industrial peace, so that the economy might not suffer. Although an adjudication under the Act might have the result of giving individual workmen personal rights against the property of the owner of the under taking, be it an individual or a company, its purpose is not really that, but to settle the industrial dispute. Obviously, the purpose is something before which the personal interests of the creditors or members of the company concerned must yield, just as, for example, they must before a criminal prosecution or a proceeding under section 145 of the Criminal Procedure Code. If we turn next to section 10 of the Industrial Disputes Act, we find that, as pointed out in *S.K.G. Sugar Ltd.* v. *Ali Hassan*[1], the section makes it obligatory on the appropriate Government to make a reference in cases falling under the proviso to sub-section (1) or under sub-section (2) of the section. Even the 'May' of the body of sub-section (1), it seems to me, gives a power coupled with a duty, and, where in its opinion the necessary conditions exist, the appropriate Government is under public duty to make a reference. The status imposes the duty solely on the appropriate Government, free of any outside control, and apart from that, if this duty were subject to control under section 446 of the Companies Act, it might become well-nigh impossible of performance, it would be strange if a duty that has to be performed in the public interest were to be controlled in order to serve the private interests of the creditors and members of a company running an industrial establishment".

The principles stated in the above two decisions are clearly applicable to the facts of this case. When once the appropropriate Government is satisfied that there is an industrial dispute, it is the duty of the appropriate Government to refer the dispute for resolution by the Labour Court or the Industrial Tribunal. Such a power which is conferred on the Government under the provisions of a special statute *viz.*, the Industrial Disputes Act, in the interest of industrial peace and harmony cannot in any manner be said to be controlled by any general principles of law that the leave of the Court which appointed the receiver should be obtained before instituting any proceeding against the receiver. The enquiry before the Labour Court under the Industrial Disputes Act, on a reference under section 10 of the Act cannot be said to be an enquiry initiated by a party against the receiver or against the property in the hands of the receiver. I have therefore no hesitation

1. (1889) 58 L.J. Ch. 536.
2. A.I.R. 1960 Ker. 247.
3. (1945) 2 M.L.J. 486; 72 I.A. 305; 59 L.W. 9; A.I.R. 1946 P.C. 16.

1. A.I.R. 1957 Pat. 722.

in coming to the conclusion that the Labour Court erred in holding that the petitioner was not entitled to any relief on account of the fact that the leave of Court that appointed the receiver had not been obtained prior to raising of the industrial dispute.

9. I accept the finding of the Labour Court that the order of retrenchment passed against the petitioner by the management did not comply with the conditions laid down in section 25-F of the Industrial Disputes Act and that therefore the order was void. The award of the Labour Court is therefore set aside to the extent it has held that the petitioner is not entitled to any relief on the ground that before reference was made to the Labour Court leave of the Court that appointed the receiver had not been obtained. The matter is remitted back to the Labour Court for appropriate award being passed in the light of its finding that the order of retrenchment passed against the petitioner was void and in the light of the finding of this Court that no leave of the Court was necessary for making a reference under section 10 of the Industrial Disputes Act. The writ petition is allowed, but under the circumstances without costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Devaraja Pillai and another *Petitioners**

v.

K.R. Purushothama Chettiar and others *Respondents.*

Civil Procedure Code (V of 1908,) Order 21, rules 98 and 103—Revision not competent against order passed under rule 98—Only appeal lies.

If the order passed under Order 21, rule 98, Civil Procedure Code holding the petitioners to be obstructors set up by the judgment-debtor and directing the removal of the obstruction caused by them is treated as a decree as provided under Order 21, rule 103, the present revision petition is not maintainable. [*Para.* 5.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Vellore, dated 28th August 1978 and made in E.A.No. 249 of 1977 in E.P. No. 27 of 1977 in O.S. No. 137 of 1975.

S. Balasubramaniam, for Petitioner.

D. K. Srinivasagopalan, for Respondents.

The Court made the following

ORDER. —This revision petition arises out of an order passed in E.A. No. 249 of 1977.

2. E.A. No. 249 of 1977 is a petition to remove the obstruction and deliver vacant possession of the property to the respondents herein. Originally the respondents herein obtained a decree in O.S. No. 137 of 1975 for possession of the suit land, as early as 28th October, 1976. E.P. No. 27 of 1977 was filed for taking delivery of the land decreed in favour of the respondent herein. This was obstructed by the petitioners herein along with others. Hence, the respondents herein filed E.A. No. 249 of 1977 against the present petitioners and also two other obstructors. The petitioners herein contended that they are in possession of a portion of the suit land in their capacity as tenants under R.W. 2. The first petitioner herein examined himself as R.W. 1 and the person under whom the petitioners state that they are the tenants, was examined as R.W. 2. R.W. 2 claimed that he has got a will in his favour in respect of the portion in question and he had let it out to the petitioners herein. Apart from these facts, the petitioners contended that they have Exhibits B-1 to B-5 which will establish their possession of a portion of the land in their individual capacity. The respondents herein contended that they have got a lawful decree in O.S. No. 137 of 1975 against one Natesa Naicker, who was in unlawful possession of the suit property and that the petitioners herein are obstructors without any right, title or interest in the suit property. The learned Additional Subordinate Judge, Vellore, after elaborately dealing with the evidence let in by the respective parties and also taking into consideration the documentary evidence produced before him, came to the conclusion that the petitioners herein are obstructors set up by the judgment-debtor and finally ordered the removal of the obstruction by the petitioners herein.

* C.R.P. No. 2820 of 1978; 24th October, 1980.

3. Aggrieved at the order passed by the learned Additional Subordinate Judge, Vellore the petitioners, who were respondents 2 and 3 in E.A. No. 249 of 1977 have filed this Civil Revision Petition.

4. It is clear from the evidence on record that the documents Exhibits B-2 to B-5 came into existence subsequent to the suit filed by the respondent herein. As regards Exhibit B-1, which is a municipal tax receipt for Rs. 3.75 dated 26th June, 1973, I am of the view that the same is in respect of a licence for vending milk, in favour of the first petitioner herein. This will not, in any way, give right to the petitioners herein to be in the suit property. The evidence on record clearly established that the respondents have got a valid decree for possession and the petitioners are unnecessarily obstructing to get delivery of a portion of the land which is occupied by the petitioner herein. There is absolutely no error of jurisdiction not any miscarrige of justice in the order passed by the learned Additional Subordinate Judge.

5. Mr. D. K. Srinivasagopalan, learned counsel for the respondents herein further states that only an appeal will lie and not a revision. It is clear from the order that the same has been passed order 21, rule 98, Civil Procedure Code. Order 21, rule 103, states as follows:

> "Where any application has been adjudicated upon under rule 96 or 100, the order made thereon shall have the same force and be subject to the same conditions as an appeal or otherwise as it were a decree".

If the order passed under Order 21, rule 98, Civil Procedure Code, is treated as a decree as provided under Order 21, rule 103 Civil Procedure Code, the present Civil Revision Petition is not maintainable. Both on merits and also on the ground that the civil revision petition is not maintainable, I am convinced that there is absolutely no substance in the present civil revision petition. In these circumstances, the civil revision petition is dismissed. No costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan and V. Sethuraman, JJ.*

P. Pathrakali Nadachi .. *Appellant**

v.

V. Subbiah Nadar and others *Respondents.*

Travancore Christian Succession Act (II of 1902 M.E.)—Hindu Nadar Christians—Custom in the matter of succession— Whether obliterated by reason of the enactment.

On the question whether the custom prevalent among the Nadars of the erstwhile Travancore State that conversion to Christianity was not a bar for inheriting the properties of the original family had become obliterated by reason of the enactment of the Travancore Christian Succession Act.

Held: While pure Hindu Law as such treated converts to Christianity as apostates and forfeited the rights to property on succession of the converts, the customary law practised by the Nadars of the erstwhile Travancore State was that the converts to Christianity should not be treated as outcastes and they should not be deprived of their right to property or succession. The modification of personal law by custom by long and continuous usage resulted in the customary law being recognised as valid and enforceable by Courts cannot be viewed from one angle alone, but must be viewed in its entire perspective. Seen from the side of the converts alone, it is no doubt true that the Christian Succession Act did not affect the rights of Hindu Nadars to overlook their conversion to Christianity of their family members and recognise their rights also to claim the properties of the family under the rule of survivorship, reversion etc. Obviously, the members of the community must have felt that notwithstanding the conversion to Christianity of some of the family members, the ties of relationship as well as social communion, marital rights, funeral rites etc., need not stand affected and likewise so long as the converts were prepared to be governed by the system of inheritance under the Hindu law, there need not be

* S. A. No. 1717 of 1976, 19th August, 1980.

any exclusion of the Christian converts from property rights. Stated differently, it means that the members of the Hindu faith agreed to give shares in their properties to the Christian converts provided, in return, their right to succeed to the properties of the Christian converts also remained unaffected and was recognised by the converts by agreeing to have a common system of inheritance under Hindu Law. It is this mutuality which should have impelled the Nadar Community to deviate fom the ancient texts and evolve a customary law that created rights and liabilities in favour of the converts as well as the non-converts. To forget this feature and contend that the usage was a completely one sided affair and the Hindu Nadars were bound by it for ever and anon irrespective of the curtailment of their mutual rights by enactments like the Christian Succession Act is too sweeping an argument to merit acceptance. Where a usage at variance with the personal law had been established to prevail amongst persons, the advantages and disadvantages resulting from that usage must be preserved in their full integrity in every individual case to which the usage is sought to be applied. Otherwise the application of the usage to one section of people alone will make the law of inheritance a lopsided one in favour of converts. Therefore, the continuance of the usage is irretrievably linked with both parties *viz*; Hindus as well as Christian converts being governed by the Hindu Law of inhertitance. Once legislation intervened and placed the Christian converts outside the fold of Hindu Law in the matter of inheritance in respect of their properties, the usage must be held to have been disrupted in its form, content and applicability resulting in its discontinuance.

[*Para.* 12.]

cases referred to:—

Anancha Perumal Nadar v. *Muthayya Nadar*, 1944 T.L.R. 595: (1944) 34 T.L.J. 503 (F. B.); *Shanmughathaya Ammal* v. *Devasahayam Nadar* I.L.R. (1954) T. C. 826: 1954 K.L.T. 448: A.I.R. 1954 T.C. 497 (F.B.); *Masanamuthu Sivananda Nadar* v. *Gopala-Pillai Ramaswami Pillai*, 22 T. L. R. 246; *Muthayya Nadar* v. *Bhagavathi Pillai Nadachi*, (1932) 22 T. L. J. 60; *Gumamoney* v. *Chempakakutti*, 2 T. L. T. 574; *Narayanamuthu* v. *Alugham*, 25 T.L.J. 708; *The Collector of Madras* v. *Mootoo Ramalinga Sethupathy*, (1867-69) 12 M.I.A. 397.

Appeal against the decree of the Court of the Subordinate Judge, Padmanabhapuram in Appeal Suit No. 245 of 1972 preferred against the decree of the Court of the District Munsif of Padmanabhapuram in Original Suit No. 18 of 1968.

V. Selvaraj, for Appellant.

Miss. O. K. Sridevi, *Francis Irhair* and *S.V.R. Thambi*, for Respondent.

The judgment of the Court was delivered by

Natarajan, J:—This appeal has been referred to this Bench because Mohan, J., before whom it came up for hearing, was of the view that there is a difference of opinion between *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] and *Shanmughathayar Ammal* v. *Devasahayam Nadar*[2] on the question whether custom prevalent among the Hindu Nadar Christians in the matter of succession is obliterated by reason of the Travancore Christian Succession Act (Travancore Act II of 1092 M.E.) and hence an authoritative ruling by a Bench of this Court would be highly desirable.

2. The third defendant in O.S. No. 18 of 1968 on the file of the Court of the District Munsif, Padmanabhapuram, who succeeded before the trial Court, but lost the case before the Subordinate Judge, Padmanabhapuram in A.S.No.245 of 1972 on the file of his Court is the appellant. For the sake of convenience, the parties will be referred to in the order of their array in the trial Court.

3. The brief narration of facts required for determination of the question of law is as given under: The suit property had been purchased by one Ponnammal under the original of Exhibit B-2, dated 29th May, 1095 (ME) corresponding to 13th January, 1920. This Ponnammal was originally married to a person of Boothapandi and through him she had a son and a daughter by name Gnanaprakasi who later embraced the Christian faith. After the death of her husband, Ponnammal married a second husband, by name Elayaperumal and through him she had two sons, viz., the first defendant (Kutti Nadar) and one

1. (1944) T.L.R. 595 : (1944) 34 T.L.J. 503. (F.B.)

2. I.L.R. (1954) T.C. 826: 1954 K.L.T. 448; A.I.R. 1954 Tra. Cochin 497. (F.B.)

Paliah Nadar. Ponnammal died in or about the year 1099 (M.E).

4. The plaintiff's case was that Elayaperumal had purchased the suit property benami in the name of Ponnammal. He claimed that after Ponnammal's death, her sons succeeded to the property and were dealing with it as owners thereof and he had purchased the southern half portion of the property from Paliah Nadar, one of the sons of Ponnammal, under a registered sale deed dated 9th July, 1949 (Exhibit A-1). He claimed that subsequent to the purchase he was in possession and enjoyment of the southern portion and he had also redeemed a mortgage over the property, but, inasmuch as the first defendant, taking advantage of the property not having been divided by metes and bounds attempted to commit encroachment by extending his house to the southern portion of the property, it had become necessary for him to approach the Court to effect a partition of the property into northern and southern portions and delineate the boundaries. Besides claiming title under the sale deed the plaintiff also claimed title by adverse possession. The plaintiff, besides impleading the second defendant who is the son of the first defendant, also impleaded the first dafendant's wife as the third defendant on the ground that the third defendant claimed to have acquired title to the property by means of a sale deed executed by Gnanaprakasi. The plaintiff's case was that Gnanaprakasi who had become an apostate had no title to the property and hence any sale deed executed by her was invalid and ineffective.

5. The case of the defendants, as set out in the written statements filed by them, was that Ponnammal was not a benamidar, but was the absolute owner of the suit property and she purchased the property from out of the funds derived by her by sale of a property left to her by her first husband. They claimed that notwithstanding Gnanaprakasi embracing Christianity, she succeeded to the property on the death of her mother Ponnammal in accordance with the custom or usage prevalent among the Nadars in Travancore State. In other words, they claimed that the principles of Hindu Law governed the rights of parties and therefore, the daughter succeeded to the properties of her mother in preference to the sons notwithstanding her conversion to Christianity. They disputed the plaintiff's claim of acquisition of title by hostile possession.

6. The trial Court found that Ponnammal was the absolute owner of the property and that she was not a benamidar. It further found that notwithstanding the apostasy of Gnanaprakasi, she succeeded to the properties of Ponnammal in accordance with the customary law governing the Nadars of Hindu and Christian faiths in Travancore State and the customary law had not been affected in any manner by the State enacting the Travancore Christian Succession Act and, as such, the sale deed executed by Gnanaprakasi in favour of the third defendant was a valid and enforceable one. The trial Court further found that the plaintiff had not derived title to the southern portion of the property either under the sale deed executed by Paliah Nadar or by adverse possession. Consequently, the trial Court sustained the case of the defendants and dismissed the suit.

7. In the appeal preferred by the plaintiff, the lower appellate Court confirmed the trial Court's finding on the question of adverse possession and about Ponnammal being the absolute owner of the property. But, in so far as the rights of Gnanaprakasi are concerned, the appellate Court followed the the ratio laid down in *Anachaperumal Nadar* v. *Muthayya Nadar* and held that after the passing of the Travancore Christian Succession Act, Gnanaprakasi had no right to inherit the estate of her mother and the estate devolved only on the two sons of Ponnammal. In accordance with that conclusion, the appellate Court upheld the sale deed in favour of the plaintiff and passed a preliminary decree in his favour for partition and separate possession of the southern half share in the suit property. It is against the reversing judgment of the lower appellate Court, the third defendant has filed the second appeal.

8. In view of the concurrent findings of the Courts below that Ponnammal was the full owner of the suit property and not merely

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1. (1944) 34 T.L.J. 503 : (1944) T.L.R. 595 (F.B.).

a benamidar and that the plaintiff had not acquired title to the half share by adverse possession, it is not open to the respondents' counsel to canvass the correctness of those findings and Miss O. K. Sridevi, learned counsel, frankly conceded this position. Therefore, the only question requiring consideration by us is whether the custom prevalent among the Nadars of the erstwhile Travancore State that conversion to Christianity was not a bar for inheriting the properties of the original family had become obliterated by reason of the enactment of the Travancore Christian Succession Act.

9. Mr. Selvaraj, learned counsel for the appellant, in support of his contention that among the Nadars of the erstwhile Travancore State, conversion to Christianity was not a bar for a male coparcener to inherit properties belonging to the coparcenary in accordance with the principles of Hindu Law and likewise, for a daughter to inherit property belonging to her mother as per the custom prevailing in that State relied upon the admissions made by the plaintiff's witnesses in their evidence and also upon the ruling of the erstwhile Travancore High Court in some cases. P.W.1 admitted in cross-examination that in his family there are Hindus as well as Christians and if a suitable bridegroom was available in a Christian Nadar family, alliance would be sought for Hindu Nadar girls; P.W.3, a close relation of Ponnammal, admitted that by reason of conversion into Christianity a Hindu Nadar male member will not be treated as an apostate and likewise, a Hindu Nadar girl marrying a Christian will not be sent out of the family. By reason of their evidence, the Courts below have held that a custom was prevalent in that part of the country among the members of the Nadar community that conversion to Christianity would not operate as a bar for inheriting the properties in the original Hindu family. The prevalence of this custom received judicial recognition in the following case. In *Masanamuthu Sivanadima Nadar* v. *Gopalakrishna Pillai Ramaswami Pillai*[1] it was held that by custom among the Shanars, conversion does not deprive the convert of his rights to inherit a share in his family properties, nor deprive him of his right to management. It was pointed out in that case that the principle that degradation from caste which accompanies conversion entailed a forfeiture of a man's civil status and loss of caste and likewise, that conversion operated as civil death under Hindu Law, would not apply to lower orders of Hindu society, since they had no recognised status and they lost nothing by change of faith. The Court noticed that social intercourse between converts and non-converts continued as free as ever and claims of inheritance by the converts were recognised. The decision in the abovesaid case was followed in *Muthayya Nadan* v. *Bhagavathi Pillai Nadachi*[1] and the Court held that there existed among Shanars, a practice by which a convert was given a share in the ancestral property notwithstanding his change of religions and among Shanars, change of religion worked no forfeiture of the civil rights of the convert in the original family.

1. 22 T.L.R. 246.

10. The correctness of the view taken in *Muthayya Nadan* v. *Bhagavathi Pillai Nadachi*[1] came to be considered by a Full Bench of the Travancore High Court in *Ananchaperumal Nadar* v. *Muthayya Nadar*[2]. In separate but concurring judgments, Krishnaswami Iyer, C.J., and Krishna Pillai J., laid down that the usage permitting an apostate to succeed having prevailed only under conditions where Hindu law governed both the deceased and the heir, there is no scope left after the Christian Succession Act for the usage to operate; the result of the Act was to abrogate the usage in its entirety as regards the Christian converts for whom it established a fresh Code of rules of succession in substitution of Hindu law. Abraham, J., took a different view and gave a dissenting judgment. Giving his reason for disapproving the ratio adopted in *Muthayya Nadan* v. *Bhagavathi Pillai Nadachi*[1] Krishnaswami Iyer, C.J. held as follows:—

"In arriving at a decision, the learned Judges, in *Muthayya Nadan* v. *Bhagavathi Pillai Nadachi*[1] had reference only to the usage amongst Shanars and never adverted to another important factor that had arisen for consideration even then in the case, *viz*., the effect upon the usage obtain-

1. (1932) 22 T.L.J. 60.
2. (1944) 34 T.L.J. 503 : (1944) T.L.R. 595 (F.B.).

ing amongst the Shanars of the passing of the Christian Succession Act of 1092 (M.E.). There could be no doubt that, as an authority on the points decided therein, we should, undoubtedly, have followed the decision in *Muthayya Nadan's case*[1] had we not to consider in the present case the further point not raised and considered in *Muthayya Nadan's case*[1] *viz.*, the effect of the passing of the Christian Succession Act of 1092 (M.E.) involving a more careful definition and understanding of the usage than was then called for".

Later down, dealing with the usage prevalent amongst the Nadar community, the learned Chief Justice spoke as follows:—

"It must be noticed that the usage, as has been established and as recognised in the cases of this Court, was limited to circumstances of a three-fold character: (1) The converts were converts to Christianity; (2) Both the converts and the non-converts, as between whom the question of succession or survivorship may arise, were governed by the Hindu law in general.

(3) Both of them were governed by one system of inheritance under the Hindu Law, in the sense that all of them were regarded as belonging to one fold of persons governed by the tie of the common Hindu Law with possible mutual rights of succession or survivorship. These appear to me to be the true conditions of the usage, and the question now arises as to the effect of the Christian Succession Act upon that usage. It has been contended that the usage as a usage meant no more than this, that amongst Hindu Nadars apostasy as a ground of exclusion from inheritance stood completely abolished and the rules of succession and survivorship under the Hindu Law, were not limited by any other considerations. I feel myself entirely unable to overlook the precise facts and circumstances governing the usage. Where a usage in variance with the law has been established to prevail amongst persons governed by the Hindu law, the advantages and disadvantages resulting from that usage must be preserved in all their integrity in every individual case to which the usage is sought to be applied. Where a Hindu Nadar can be an heir to a Christian Nadar and *vice versa* and as between such Nadars following the Hindu law, the usage excluded the disqualification of exclusion from inheritance on the ground of apostasy, is it permissible to infer that the usage can subsist where, under changed conditions, the Hindu Nadar could not succeed to the Christian Nadar under the Hindu Law as theretofore and this disparity has arisen by a statutory interference? It appears to me that it is of the essence of the usage that the person succeeding and the person succeeded to must both be governed by Hindu law for the usage to apply...... But where the apostate becomes not only an apostate to the Hindu faith, but also became an apostate to the Hindu law, if I may use that expression, I find it impossible to predicate that the known usage could at all apply to those conditions. Usage must be based upon what has been observed and what has been done. The applicability of usage to these changed conditions would only be an attempt, I believe, ineffectual, to extend the usage and not to apply the usage in its original integrity in the conditions and the atmosphere under which it prevailed."

Krishna Pillai, J., who concurred with the view of the learned Chief Justice, gave expression to his view in the following manner:

"The time-honoured custom of Christians being recognised as forming part of a Hindu family was thus effectivley put an end to, with the result that the Hindu law, purged of the custom, became thereafter the law governing the Hindu sect, and the Christian Succession Act untainted by the custom which had become obnoxious to the Christian Nadars was made the basic law for all matters of succession and inheritance amongst them. In this view, it is not possible to see how any part of the custom which was so abrogated can be said to have survived the Act. To concede that survivorship was destroyed, but reversion continued, is to say the least illogical."

1. (1932) 22 T.L.J. 60.

11. We shall refer to the dissenting judgment of Abraham, J., at a later stage, since Mr. Selvaraj placed reliance on that judgment and canvassed for its acceptance. In the later Full Bench case, which, according to the learned single Judge, appeared to conflict with the view taken in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] the controversy was limited in scope and did not deal with the general question as to the impact made by the Christian Succession Act on the customary law of succession followed by the Nadars. What arose for consideration in *Shanmugathayi Ammal* v. *Devasahayam Nadar*[2] was whether a Nadar Christian woman who succeeded to the properties left by her husband as a limited owner in accordance with the principles of Hindu Mitakshara law followed by them can be deemed to have acquired absolute title to the properties by reason of the Christian Succession Act being enacted. *Inter alia* a question was raised whether the second plaintiff in that suit, who was born a Christian, could lay claim to the property as a reversioner on the footing that succession amongst Christian Nadars was governed by the principles of Hindu Law as per custom. The Full Bench held that since the last full owner died in 1076 (M.E.) *i.e.*, before the Christian Succession Act was enacted, the second plaintiff, though a Christian, was entitled to claim reversionary rights on the basis of customary law. On the other question regarding the enlargement of rights of the limited female owner, the Full Bench pointed out that under section 3 of the Christian Succession Act, the provisions of the Regulation would not apply to any intestacy occurring before the date on which the Regulation came into force. The Full Bench followed the ratio in two earlier cases, *viz*:— *Gummamony* v. *Chempakutti*[3] and *Narayana Muthu* v. *Abraham*[4] and declined to follow the view taken in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] and held that the Christian Succession Act contained no provision which would justify the Court holding that a widow's estate would get converted into an absolute estate by the passing of the Christian Succession Act. We may mention here that in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] it was held that the limited estates held by Nadar women under the Hindu law became converted into absolute estates with full powers under the Christian Succession Act. It is only with this statement of law the latter Full Bench differed and held that it cannot approve of that statement. In such circumstances, we have to point out that as far as the debate contained in the second appeal is concerned, there is no conflict of views between *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] and *Shanmugathayi Ammal* v. *Devasahayam Nadar*[2].

12. In view of this position, we can dispose of the appeal by holding that the first appellate Judge had applied the correct principles of law and decreed the suit and as such the appeal must fail. However, Mr. Selvaraj contended before us that we should independently examine the correctness of the ratio laid down in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] and render judgment in the case. Learned counsel stated that the Christian Succession Act had been enacted only to consolidate and amend the rules of law applicable to intestate succession among the Indian Christians in Travancore and the legislation had not interfered with or abrogated the customary law followed by the Hindu Nadars of Travancore State, which permitted members of Nadar families belonging to the Christian faith also being admitted to inheritance and succession. Learned counsel argued that it did not implioredly impinge upon the usage adopted by the Hindu Nadars in refraining from treating the converts to Christianity as apostates and instead, treating them as members of the family and admitting them to succession in accordance with the principles of Hindu law. As such, any change brought about by the Christian Succession Act to regulate the law of succession relating to Christian converts cannot have the effect of extinguishing the customary law followed by the Nadars of the Hindu faith and, consequently, the customary law will continue to govern the Hindu and Christian Nadars so far as the rights of succes-

1. (1944) 34 T.L.J. 503: (1944) T.L.R. 595 (F.B.).
2. I.L.R. (1954) Tra. Co. 826: A.I.R. 1954 T.C. 497 (F.B.).
3. 2 T.L.T. 574.
4. 25 T.L.J. 708.

1. (1944) 34 T.L.J. 503: (1944) T.L.R. 595 (F.B.).
2. I.L.R. (1954) T.C. 826: A.I.R. 1954 T.C. 497 (F.B.).

sion to properties left behind by Hindu Nadars are concerned. To put it differently, the submission of learned counsel was that though the converts would, subsequent to the passing of the Act, be governed by the Christian law of succession, the non-converts *i.e.*, Hindus, would continue to be governed by the old and subsisting law governing them. In this context, learned counsel placed very great reliance on the dissenting judgment of Abraham, J., in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1]. The relevant portions in the judgment read as follows:—

> "Indeed, the gist of the argument was that with the passing of the Christian Succession Act which applied to the Nadar converts, the usage primarily existing stood abrogated, for want of mutuality.
>
> It seems to me impossible to accept this argument for the simple reason that in spite of the Christian Succession Act, the law of the Hindu Nadar remained the same and should govern the devolution of his property. Part of that law was an established usage whereby apostasy did not work any forfeiture of rights to property or succession.......There was absolutely no disqualification from the religious, social or proprietary point of view. The disqualification was removed not by Hindu law, but in spite of it and by custom. If, in these circumstances, before the Christian Succession Act came into force, family properties had been actually divided, between the convert and his Hindu relations, such division would not still have reintroduced any peculiar disqualification or abrogated the custom in use. The Christian Succession Act practically brought about this division by transforming the joint tenancy into a tenacncy in common. Partnership and its concomitant survivorship ceased to exist. That was all. The convert would, thereafter, be governed by the Christian law of succession and the Hindu, by the old and subsisting law governing him."

Eventually, Abraham, J., held as follows:—

> "If any change is deemed neccessary, it should be brought about by legislation, and not by Judicial interference. It is not for the Court to make up for any mutuality previously enjoyed, by changing the law for the Hindu Nadars from what it now obtains."

Mr. Selvaraj submitted that the view taken by the dissenting Judge, Abraham, J., had eventually found favour with Government and this is reflected by the extension of the Caste Disabilities Removal Act (XXI of 1850) to Kanyakumari district in 1951 (1126 M.E.). Section 1 of that Act reads as follows:—

> "1. Law or usage which inflicts forfeiture of, or affects, rights on change of religion or lose of caste to cease to be enforced:—
>
> So much of any law or usage now in force within India as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance, by reason of his her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in any Court."

Since this Act has been extended to Kanyakumari district to which the parties belong long after the death of Ponnammal, its provisions cannot have application to the facts of the case, and hence it is not necessary for us to dwell at length on the change brought about by the legislation on the personal law or usage which affected the rights of inheritance of any person by reason of exclusion from the communion of any religion or deprival of caste. It will however be apposite to point out that we are not now dealing with any usage which affected the rights of inheritance of persons on the ground of religious or caste considerations, but on the other hand, we are concerned with the continuance of a custom which accorded with the underlying object of the Caste Disabilities Removal Act. While pure Hindu Law as such treated converts to Christianity as apostates and forfeited the rights to property or succession of the converts, the customary law practised by the Nadars, in so far as the converts to the Christian faith should not be treated as outcastes and they would not be deprived of their right to property or succession. In our opinion, the modification of the personal law by custom by long and continuous usage which resulted in the customary law

1. 34 T.L.J. 503: 1944 T.L.R. 595 (F.B.)

being recognised as valid and enforceable by Courts, cannot be viewed from one angle alone, but on the other hand, must be viewed in its entire perspective. Seen from the side of the converts alone, it is no doubt true that the Christian Succession Act did not affect the rights of Hindu Nadars to overlook the conversion to Christianity of their family members and recognise their rights also to claim the properties of the family under the rule of survivorship, reversion etc. But, what is of significance is whether, on this ground alone, the appellant's contention that the Act in question did not interfere with the practice of the customary law can be accepted. For a proper appreciation of the matter, we must bear in mind the underlying reason for the members of the Nadar community deviating from the principles of Hindu law and admitting to succession and inheritance the members of the family who had gone over to the Christian faith. Obviously, the members of the community must have felt that notwithstanding the conversion to Christianity of some of the family members, the ties of relationship as well as social communion, marital rights, funeral rites etc., need not stand affected and, likewise, so long as the converts were prepared to be governed by the system of inheritance under the Hindu law, there need not be any exclusion of the Christian converts from property rights. Stated differently, it means that the members of the Hindu faith agreed to give shares in the properties to the Christian converts provided, in return, their rights to succeed to the properties of the Christian converts also remained unaffected and was recognised by the converts by agreeing to have a common system of inheritance under the Hindu law. It is this mutuality which should have impelled the Nadar community to deviate from the ancient texts and evolve a customary law that created rights and liabilities in favour of the converts as well as the non-converts. To forget this feature and contend that the usage was a completely one-sided affair and the Hindu Nadars were bound by it for ever and irrespective of the curtailment of their mutual rights by enactments like the Christian Succession Act, is too sweeping an argument to merit acceptance. As pointed out by Krishnaswami Iyer, CJ., were a usage at variance with the personal law had been established to prevail amongst persons, the advantages and disadvantages resulting from that usage must be preserved in their full integrity in every individual case to which the usage is sought to be applied. Otherwise, the blind application of the usage to one section of the people alone will make the law of inheritance a lopsided one in favour of the converts. By way of illustration, it may be stated that a convert can lay claim to the properties of a Hindu as a survivor or as a reversioner, but correspondingly a Hindu will not be entitled to claim such rights against the properties left by a convert, since the latter's properties will be governed by the Christian Succession Act in the matter of succession. Therefore, the continuance of the usage is irretrievably linked with both parties, *viz.*, Hindus as well as Christian converts being governed by the Hindu law of inheritance. Once legislation intervened and placed the Christian converts outside the fold of Hindu law in the matter of inheritance in respect of their properties, the usage must be held to have been disrupted in its form, content and applicability resulting in its discontinuance. We are unable to share the opinion of Abraham, J., that not with standing the converts being governed by the Christian law of succession, the Hindu Nadars will continue to be governed by the customary law practised by them hitherto and that a change in the state of affairs can be brought about only by legislation and not judicial interference. The learned Judge has failed to note that no legislation was called for since the customary law died a natural death by reason of the Christian Succession Act robbing the customary law of its content of mutuality, and as such, all that the Court had done in *Anancha-perumal Nadar* v. *Muthayya Nadar*[1] was only to have noticed this feature and determined the rights of parties accordingly.

13. In the course of his arguments, Mr. Selvaraj submitted that once materials were placed before Court to prove the practice of a customary law by a certain section of the public, then the bounden duty of the Courts was to respect the usage and administer the law accordingly and it is not open to Courts to fashion the law according to its own views. ... ...

1. 36 T.L.J. 503: 1944 T.L.R. 595 (F.B.).

of justice and fairplay or refuse to administer the customary law on the ground that it suffered from short comings such as lack of mutuality etc. To buttress his contention, the counsel referred to a passage from Salmond on Jurisprudence (Twelfth Edition) at page 32 and the observation of the Privy Council in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathi*[1]. The passage from Salmond on Jurisprudence reads as follows:—

> "Speaking generally, it is well that Courts of justice, in seeking for those rules of right, which it is their duty to administer, should be content to accept those which have already in their favour the prestige and authority of long acceptance, rather than attempt the more dangerous task of fashioning a set of rules for themselves by the light of nature. The national conscience may well be accepted by the Courts as an authoritative guide; and of this conscience national custom is the external and visible sign."

In *The Collector of Madura* v. *Mootoo Ramalinga Sethupathy*[1] the Privy Council has observed as follows:—

> "The duty of a Judge to administer Hindoo Law is not so much to inquire whether the disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindoo law, which prevails in the District in which the case arises with which he has to deal, and whether such doctrine has been sanctioned by usage; as by the Hindoo system of law clear proof of usage will outweigh the written opinion of text writers.

We are of opinion that the legal proposition extracted above are undoubtedly indisputable, but what has been overlooked by the counsel is that what we are now called upon to decide is, not about the wisdom and equitable nature of the customary law, but whether it continued to have operative force in spite of the inroads made into it by the Christian Succession Act. Examined from that angle, the passages do not have any relevance to the debate in the appeal. Another passage is also cited by the counsel and that is fund at page 161 of Mulla's Hindu Law (14th Edition), and the passage relates to the effect of the Caste Disabilities Removal Act. It runs as follows:—

> "Change of religion and loss of caste which at one time were grounds of forfeiture of property and of exclusion from inheritance ceased to be so after the passing of the Caste Disanbilities Removal Act, 1850."

The reference to this passage is not called for in this appeal, because the Caste Disabilities Removal Act was extended to Kanyakumari district long after the death of the owner of the suit property Ponnammal. Even if the Act had been extended before her death, it cannot have any application, because what the law sought to achieve had already been achieved by the members of the Nadar Community by evolving a customary law which ran counter to the prescription given by the orthodox Hindu Law. The benevolent usage, however, was materially affected by the Christian Succession Act taking away the Christian converts outside the fold of Hindu Law in so far as succession to their properties was concerned and this caused a fundamental disruption of the usage which deprived it of its uniform applicability to Hindu Nadars as well as Christian Nadars and conferring in the process mutual rights of succession in favour of both. We are therefore clearly of the view that the *ratio decidendi* in *Ananchaperumal Nadar* v. *Muthayya Nadar*[1] is fully worthy of acceptance and, secondly, there is no conflict of opinion between that case and *Shanmugathayi Ammal* v. *Devasahyam Nadar*[2].

14. As the lower appellate Court has applied the correct principles of law and decreed the suit, it follows that the second appeal has to fail and will accordingly stand dismissed. We, however, make no order as to costs.

15. The learned counsel for the appellant makes an oral application for certificate of leave being granted under Article 133 of the Constitution of India for an appeal being preferred to the Supreme Court against our judgment. We do not think this is a fit case for granting certificate because, firstly,

1. (1967-69) 12 Moo. I.A. 397.

1. 36 T.L.J. 503 : 1944 T.L.R. 595 (F.B.)
2. I.L.R. (1954) T. C. 826 : A.I.R. 1954 T.C. 497 (F.B.)

the question of law involved is not of such general importance as needs determination by the Supreme Court, and secondly, after the Hindu Succession Act, 1956, came into force, the question as to whether Christian Nadars can claim right of succession to the properties owned by their Hindu relations on the foot of customary law, which itself, in our opinion, became obliterated by reason of the passing of the Travancore-Cochin Succession Act, cannot at all arise.

16. Hence, we decline to grant leave.

R.S. ——— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ratnam, J.*

Shriram Chits and Investments (P.) Ltd., represented by its Executive Director

v. .. *Petitioner**

S. Padmanaban and others

.. *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 11 (2) — Scope — Proceedings initiated long after the coming into force of Act (CIV of 1976) — Amended provisions to apply — Order for payment of decree amount in instalments — Consent of decree-holder not obtained — Court nevertheless ordering payment in instalments—Order liable to be set aside.

Whatever might have been the position prior to the amendment of the Code of Civil Procedure by Act CIV of 1976, now, under Order 20, rule 11 (2) the Court, after the passing of the decree, is empowered to pass an order directing the payment of the decree amount in instalments on an application by the judgment-debtor and with the consent of the decree-holder and on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as the Court thinks fit. Section 97 (1) of the Act CIV of 1976, declares that any amendment made, or any provision inserted in the principal Act by the High Court before the commencement of Act CIV of 1976, except in so far as the amendment or provision is consistent with the provisions of the principal Act as amended by Act CIV of 1976, by the Civil Procedure Code, shall stand repealed. Section 97 (2) of Act CIV of 1976, which saves the applicability of some of the provisions introduced by Act CIV of 1976, does not include Order 20, rule 11 of the Code of Civil Procedure. Section 97 (3) of Act CIV of 1976 declares that except as otherwise provided in sub-section (2), the provisions of the principal Act in the Civil Procedure Code, as amended by Act CIV of 1976 shall apply to every suit, proceeding, appeal or application pending at the commencement of the Act or instituted or filed after such commencement. In the present case, the proceedings, out of which the civil revision petition arises have been instituted in 1980 long after the coming into force of the provisions of the Code of Civil Procedure (Amendment) Act CIV of 1976, and consequently, the amended provisions of Order 20, rule 11 (2), Civil Procedure Code, would apply to the instant case. Though the judgment-debtors had made an application for a direction that the decree amount should be made payable by instalments, yet the petitioner, as decree-holder, had opposed the same and therefore in the instant case the decree-holder has not consented to the payment of the decree amount in instalments which is a vital condition as per the amended provision. In the absence therefore, of consent on the part of the petitioner, the Court below acted with material irregularity in extending the time for payment of the balance of the decree-amount in six instalments. The order has therefore to be set aside.

[*Para.* 2.]

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the X Assistant Judge of the City Civil Court, Madras, dated 23rd July, 1980 and made in E.A. Nos. 1674 and 1672 of 1980 respectively (E.P. No. 33 of 1980 in O.S. No. 7689 of 1976.)

N. Venkataraman for Petitioner.

Miss K. Manjula for 2nd Respondent.

The Court made the following

ORDER.—The decree-holder in O.S. No. 7689 of 1976, 10th Assistant Judge, City Civil Court, Madras, is the petitioner in these Civil Revision Petitions. A decree

*C.R.P.Nos. 2078 and 2079 of 1980. *12th January*, 1981.

was obtained on 7th February, 1978, for a sum of Rs. 6,692 by the petitioner against the respondents herein and in order to realise the amount due under the decree, the petitioner, on 10th December, 1979, filed an application for execution as well in E.P. No. 33 of 1980. While so, on 21st March, 1980, two applications were filed by the respondents herein E. A. Nos. 1674 of 1980 and 1672 of 1980 in E.P. No. 33 of 1980, purporting to be under section 151, Civil Procedure Code, praying for an extension of time to pay the balance of the decree amount in 10 months and also for raising the order of attachment ordered in E.P. No. 33 of 1980. Those applications were opposed by the petitioner. Even so the executing Court granted six month's time to the respondents herein to pay the decree amount and consequently, directed the raising of the order of attachment ordered in E.P. No. 33 of 1980. It is the correctness of this that is challenged in these civil revision petitions by the decree-holder.

2. What is urged by the learned counsel for the petitioner is that since at the time when the decree was passed in the present case on 7th February, 1978, the respondents did not pray for any time for payment of the decree amount, any such order permitting the payment of the decree amount in instalments by the respondents-judgment-debtors can be passed later only with the consent of the petitioner/decree-holder and not having been so done in the present case, the order permitting the respondents to pay the decree amount in six month's time is illegal. On the other hand, the learned counsel for the respondents would contend that it would be a matter for the Court to decide whether an instalment payment should be granted even after the decree or not and that in the present case, the Court has considered all the circumstances of the case and permitted the respondents to pay the decree amount by granting six month's time and also by raising the attachment and that such an order is perfectly justified by the circumstances of the case and does not deserve, to be interfered with in revision. Whatever might have been the position prior to the amendment of the Code of Civil Procedure by Act CIV of 1976, now under Order 20, rule 11 (2), the Court after the passing of the decree is empowered to pass an order directing the payment of the decree amount in instalments on an application by the judgment-debtor and with the consent of the decree-holder and on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as the Court thinks fit. Section 97 (1) of Act CIV of 1976 declares that any amendment made, or any provision inserted in the principal Act by the High Court before the commencement of Act CIV of 1976, except in so far as the amendment or provision is consistent with the provisions of the Principal Act as amended by Act CIV of 1976 of the Civil Procedure Code shall stand repealed. Section 97 (2) of Act CIV of 1976 which saves the applicability of some of the provisions introduced by Act CIV of 1976 does not include Order 20, rule 11 of the Code of Civil Procedure. Section 97 (3) of Act CIV of 1976 declares that except as otherwise provided in sub-section (2), the provisions of the Principal Act *viz.*, the Civil Procedure Code as amended by Act CIV of 1976 shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement In the present case, the proceedings, out of which the Civil Revision Petitions arise, have been instituted in 1980 long after the coming into force of the provisions of Act CIV of 1976 and consequently, the amended provision of Order 20, rule 11 (2), Civil Procedure Code, would apply to the instant case. Though the judgment-debtors had made an application for a direction that the decree amount should be made payable by instalments, yet, the petitioner, or the decree holder, had opposed the same and therefore, in the present case, the decree-holder has not consented to the payment of the decree amount in instalments, which is a vital condition as per the amended provision. In the absence, therefore, of consent on the part of the petitioner, the Court below acted with material irregularity in extending the time for payment of the balance of the decree amount in six instalments. That order does not conform to the requirements of Order 20, rule 11 (2) of the Code of Civil Procedure as amended and has, therefore, to be set aside. Consequently, the order raising the attachment has also to be set aside. The result is, the orders passed by the executing Court in E.A. No. 1674 of 1980 and 1672 of 1980 in E. P. No. 33 of 1980

in O.S. No. 7689 of 1976 are set aside and E.A. No. 1674 of 1980 and 1672 of 1980 are dismissed. The Civil Revision Petitions are allowed. No costs.

R.S. —— *Revision Petition allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, CJ., M. A. Sathar Sayeed and R. Sengottuvelan, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras. .. *Petitioner**

v.

T. Ranganathan Pillai, represented by the Power of Attorney Agent, R. Krishnaveni .. *Respondent.*

Indian Stamp Act (II of 1899), sections 2 (24) and 64 (a)—Settlement—Definition—Document in question —Purporting to be a trust deed—Whether trust deed or settlement —Proper stamp duty payable.

Ultimately the nature and character of a transaction has to be determined only with reference to the language which the document employs. Admittedly, in the present case the document in question purporting to be a trust deed was not an agreement in writing to make any disposition. Therefore it could not fall within the first limb of the inclusive part of the definition of "settlement" in section 2 (24) of the Indian Stamp Act. The only other point is whether it could be said to be an instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition. The crucial word to be considered in this behalf is the word 'such' qualifying the expression "disposition". Therefore in the inclusive portion of the definition the expression "such disposition" would undoubtedly govern only dispositions contemplated by clauses (*a*), (*b*) or (*c*) of section 2 (24) of the Indian Stamp Act. If the disposition did not fall within the scope of section 2 (24) (*a*), (*b*) or (*c*) then the inclusive portion of the definition would also not apply. [*Para.* 3.]

Held, that having regard to the recitals, the document in question was chargeable to stamp duty under Article 6, clause (*a*) as a declaration of trust and not under Article 58 as a settlement as defined in section 2 (24) of the Indian Stamp Act. [*Para.* 4.]

Case referred by the Chief Controlling Revenue Authority, Board of Revenue, Madras to the High Court for its opinion, under section 57 of the Indian Stamp Act, 1899, the following questions:—

"Whether the document dated 5th November, 1975, executed by the Respondent and purporting to be a Trust Deed is just a Trust deed and liable to be stamped as such under Article 64-A of Schedule I to the Stamp Act or is a Settlement Deed as defined under section 2 (24) of the Stamp Act and therefore liable to be stamped as such under Article 58 (A) of Schedule I to the Stamp Act".

N. R. Chandran, the Additional Government Pleader, for Petitioner.

R. G. Rajan, for Respondent.

The Judgment of the Court was delivered by

Ismail, CJ.—In this reference made under section 57 of the Indian Stamp Act (Central Act II of 1899), the question that requires to be considered, as set forth by the Chief Controlling Revenue Authority, Board of Revenue, Madras, is:

"Whether the document dated 5th November, 1975, executed by the respondent and purporting to be a trust deed is just a trust deed and liable to be stamped as such under Article 64-A of Schedule I to the Stamp Act or is a settlement deed as defined under section 2 (24) of the Stamp Act and therefore liable to be stamped as such under Article 58-A of Schedule I to the Stamp Act?"

2. Before referring to the concept of a settlement deed or a trust deed as defined in the Act or as known to the law, we would like to refer to the terms of the document.

* R.C. No. 1 of 1980. *10th November, 1980.*

in question since ultimately it is the terms of the document which will determine the character of the transaction. The document was executed by the respondent, T. Ranganathan Pillai, on 5th November, 1975, in favour of his mother's sister's husband. In the document it is recited that even during the lifetime of his father, the respondent and his brothers became divided from the father and because of his inexperience and inability to manage his own properties, his father, in the interest of the family, was managing the properties of the respondent also and that after the death of the father on 8th February, 1975, the respondent did not have any assistance or help from proper persons for the management of the properties and therefore had experienced several difficulties. The document also points out that persons who were prepared to take advantage of the inexperience of the respondent and injure him were not wanting. It is in such a situation he thought about the best method of serving the properties for the benefit of himself and the members of the family and, on the advice of and in consultation with his paternal uncle and others who were interested in the affairs of the family, he came to the conclusion that the only method of dealing with the situation was to create a trust in respect of his properties for the benefit of his family and himself. It is in view of this conclusion he was executing the document. He further pointed out that there were debts incurred by his father and his share of the debts had also not been discharged and he had executed a power of attorney in favour of his brother Peria Thiruvadia Pillai in connection with the discharge of those debts and he had to support his wife Krishnaveniammal and his daughter Parvathy out of his estate. The document further states that in view of the drought, the properties were not yielding any income and he was finding it difficult even to maintain himself and his family and, in the prevailing situation, he had to incur debts for the purpose of running the family itself. Under these circumstances, for the purpose of properly maintaining himself and his family he was creating a trust in respect of the properties in favour of his mother's sister's husband, S. S. Muthukumaraswamia Pillai. The document recites that he was transferring all his properties in favour of the said Muthukumaraswamia Pillai, by way of trust, so that in the interest of the family of the respondent, he could absolutely administer, enjoy and deal with the properties. One of the recitals in the document says that in his capacity as trustee, the said Muthukumaraswamia Pillai will realise the income from the properties and maintain the respondent and the members of the family and the said Muthukumaraswamia Pillai, in his discretion, can enjoy the properties directly or by leasing out and he should maintain correct accounts in respect of the income and expenditure of the estate, even though having regard to the confidence he had reposed in the said Muthukumaraswamia Pillai, he had no right to question the correctness of the accounts maintained by him or take proceedings against him with reference thereto. It also states that if the trustee feels a transfer or exchange of any of the properties was necessary for the benefit of the family, he was competent to do so. Thereafter occur a few crucial sentences; one such sentence is that if any one of his children becomes a major, the trustee, namely Muthukumaraswamia Pillai, is under an obligation to entrust the trusteeship to that major so that he can administer the properties for the benefit of himself and the other heirs of the respondent. The document further states that if before any one of the heirs of the respondent attains majority, the said Muthukumaraswamia Pillai wants to free himself from the trusteeship, it is open to him after consultation with the uncle of the respondent, namely, T. K. Ramanuja Kaviodayar, to nominate another trustee and hand over the trusteeship to him. The person who thus becomes a trustee will have to perform the obligations and exercise the rights referred in the trust deed. The document concludes by stating that the respondent had no right to either modify or cancel the same. It is this document with these recitals that has now to be considered as to whether it is a settlement as defined in the Stamp Act or merely a trust deed.

3. The expression 'Settlement' has been defined in section 2 (24) of the Indian Stamp Act, 1899 and that definition reads as follows:—

"'Settlement' means any non-testamentary disposition, in writing, of movable or immovable property made—

(*a*) in consideration of marriage,

(*b*) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or

(*c*) for any religious or charitable purpose; and includes an agreement in writing to make such a disposition and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition".

It is not in dispute that before a transaction can fall within the scope of this definition, the disposition of the property must be made for one or other of the three purposes mentioned in clauses (*a*), (*b*) and (*c*). It is conceded by the learned Additional Government Pleader that the document will not come within the scope of section 2 (24) (*a*) of the Stamp Act, because there is no disposition of property in consideration of marriage. Equally admittedly the transaction will not come within the purview of section 2 (24) (*c*) because there is no disposition of property for any religious or charitable purpose. The learned Additional Government Pleader, at one stage felt that the transaction will fall within the scope of section 2 (24) (*b*), but on further consideration after reading the recitals in the document, conceded that clause (*b*) of section 2 (24) also will not apply. Ultimately the learned Additional Government Pleader had to fall back upon only the inclusive portion of the definition reading:—

"........as agreement in writing to make such a disposition and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition".

Admittedly the document in question is not an agreement in writing to make any disposition. Therefore it cannot fall within the first limb of the inclusive part of the definition as well. Then there remains only one other point, namely whether it can be said to be an instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition. The crucial word to be considered in this behalf is the word 'such' qualifying the expression "disposition". Therefore, in the inclusive portion of the definition the expression "such disposition" will undoubtedly govern only the disposition contemplated by clauses (*a*), (*b*) or (*c*) of section 2 (24). If the disposition does not fall within the scope of section 2 (24), (*a*), (*b*) or (*c*), then the inclusive portion of the definition also will not apply. As we pointed out already, the learned Additional Government Pleader also has conceded that neither clause (*a*), nor clause (*c*) nor even clause (*b*) applies to the transaction in question, and consequently, the inclusive portion of the definition also cannot apply. It is not in controversy that if the transaction in question does not fall within the scope of section 2 (24) of the Stamp Act, as a settlement, it has to be treated only as a declaration of trust under Article 64, clause (*a*) and there is no contention that it will fall under any other Articles of Schedule I to the Indian Stamp Act, 1899. We may point out that the learned Additional Government Pleader drew our attention to certain decisions of this Court as well other High Courts but we are not referring to any of them because, ultimately the nature and character of a transaction has to be determined only with reference to the language which the document employs.

4. Under these circumstances, we answer the the question referred to this Court by stating that the document in question is chargeable to stamp duty under Article 64, clause (*a*) as a declaration of trust and not under Article 58 as a settlement as defined in section 2 (24) of the Indian Stamp Act, 1899. As this question is answered against the revenue, the respondent is entitled to his costs, counsel's fee is fixed at Rs. 250.

R.S. ——— *Reference answered against the revenue.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

M. S. Hameed .. *Petitioner**

v.

Kanniammal .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *section* 25 *and Civil Procedure Code (V of* 1908), *section* 115—*Petition for eviction by landlord*—Ex parte *order of eviction passed—Petition to set aside* ex parte *order—Conditional order directing petitioner to pay costs on or before a particular date—Costs not paid—Petition dismissed—Revision to High Court against that order whether maintainable under section* 115, *Civil Procedure Code.*

The Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), is a self-contained Act containing provisions for appeal as well as revision and enabling an aggrieved party to challenge the correctness of the order passed by Authorities under the Act in the manner provided thereunder and no more. The resort to section 115 of the Code of Civil Procedure in matters or proceedings, arising out of the provisions of the Act cannot be had to test the correctness of the orders passed under the Act. Therefore it may not be appropriate to characterise the provisions of section 115 of the Code of Civil Procedure, and section 25 of the Act as mutually exclusive and to hold that the revisional power under section 115 of the Code of Civil Procedure is always available even with reference to the matters arising under the provisions of the Act under which special, but limited provisions are made to question the correctness of orders passed under the provisions of that Act. In view of these considerations, the Civil Revision Petition filed by the petitioner purporting to be under section 115 of the Code of Civil Procedure cannot be entertained in the High Court. [*Para.* 6.]

*C.R.P. No. 2217 of 1980.

12*th November*, 1980.

Cases referred to:—

Arunachalam v. *Lt. Col. Srinivasan,* (1968) 1 M.L.J. 435; *Rai Brij Raj Krishna* v. *S. K. Shaw and Brothers,* 1951 S. C. R. 145: 1951 S.C.J. 238: 64 L.W. 366: A.I.R. 1951 S.C. 115; *Central Bank of India* v. *Gokal Chand,* (1967) 2 S.C.J. 828: (1967) 1 S.C.R. 310: A.I.R. 1967 S. C. 799; *Shankarlal Agarwal* v. *Shankarlal Poddar,* (1964) 1 S.C.R. 717: (1965) 35 Comp. Cas. 1: A.I.R. 1965 S.C. 507.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the District Munsif, Poonamallee dated 17th July, 1980 and made in I.A. No. 3 of 1979 in R.C.O.P. No. 1 of 1973.

N. Maninarayanan, for Petitioner.

N. S. Varadachari and *J. Dilipkumar,* for Respondent.

The Court delivered the following

JUDGMENT.—The tenant in R.C.O.P. No. 1 of 1973 is the petitioner in this Civil Revision Petition which is directed against the order dismissing his application in I.A. No. 3 of 1979 praying for the setting aside of an *ex parte* order of eviction on the ground of non-payment of costs as directed. There is no dispute that the petitioner is a tenant within the meaning of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973) (hereinafter referred to as the Act). On 16th December, 1978, an *ex parte* order of eviction was passed against the petitioner. Thereafter, the petitioner filed I.A. No. 3 of 1979 in R.C.O.P. No. 1 of 1973 to set aside—the *ex parte* order of eviction and on 8th July, 1980, the Rent Controller passed a conditional order setting aside the *ex parte* order of eviction directing the petitioner to pay Rs. 25 as costs to the landlord|respondent on or before 16th July, 1980. However, the petitioner did not pay the costs within the time granted by the Rent Controller with the result I.A. No. 3 of 1979 was dismissed on 17th July, 1980, as the costs had not been paid. It is the correctness of the order that is challenged by the tenant in the course of

the civil revision petition preferred under section 115 of the Code of Civil Procedure.

2. Even before the civil revision petition was numbered, an objection was raised by the office as regards the maintainability of the civil revision petition under section 115 of the Code of Civil Procedure, in matters falling under the Act. However, on the strength of a decision of this Court, reported in *Arunachalam* v. *Lt. Col. Srinivasan*[1], Justice Nainar Sundaram was persuaded to direct the office to number the civil revision petition subject to the question of the maintainability of the civil revision petition being decided by the learned Judge before whom the matter is ultimately posted for disposal after hearing both parties comprehensively. The learned Judge has also directed that the question of the maintainability may be heard first before the merits are gone into and that it will not be open to the petitioner to voice forth a grievance that the revision having been admitted should not be thrown out on the ground of non-maintainability at a later stage. Though a case of this kind can be easily disposed of by a consideration of the merits thereof, yet out of respect to the learned Judge who had directed the question of maintainability of the civil revision petition to be decided in the course of the final hearing, that matter is being gone into.

3. On the question of maintainability of the civil revision petition, the learned counsel for the petitioner strongly relies upon the decision in *Arunachalam* v. *Lt. Col. Srinivasan*[1], and contends that a civil revision as has been filed in the present case is not only maintainable, but competent as well. Before considering the question whether the civil revision petition is maintainable, it is necessary to notice the important and relevant provisions of the Act briefly touching upon appeals and revisions under the Act. Sections 10 and 14 of the Act enable a landlord to secure an order for eviction against a tenant if he satisfies the Rent Controller that grounds mentioned therein are available to him to secure such an order. Under section 23 of the Act, provision for the preferring of an appeal against the order passed by a Rent Controller has been made. Section 25 of the Act enables a person aggrieved by an order of the appellate authority to invoke the revisional jurisdiction of this Court in order that the correctness, regularity, legality or propriety of any decision or order passed may be considered and appropriate orders either modifying, annulling, reversing or remitting for reconsideration can be passed. A consideration of the provisions of the Act would, therefore, *prima facie* disclose that apart from the remedies provided for under the Act, there is no other remedy which can be availed of by a person aggrieved by an order passed by the authorities under the Act. A detailed reference as well as a consideration of those provisions would only reinforce that conclusion. Under section 23 (1) (*a*) of the Act, the Government is empowered to constitute authorities for purposes of entertaining and disposing of appeals against orders of eviction passed by the Rent Controllers. Section 23 (1) (*b*) of the Act prescribes a period of fifteen days as the time within which such an appeal should be preferred excluding however the time taken to obtain certified copy of the order appealed against. Section 23 (2) confers powers of stay on the appellate authority pending the decision on the appeal. The scope of the powers of the appellate authority as well as the mode of disposal of appeals are indicated in section 23 (3) of the Act. Section 23 (4) of the Act is important and that section runs thus:

> "The decision of the appellate authority, and subject to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of Law, except as provided in section 25".

This section recognises and gives effect to the finality of the decisions of the Rent Controller as well as the appellate authority subject to such finality being questioned by a revision under section 25 of the Act. Section 23 (4) deals with not only the finality of the orders passed by the appellate authority and the Controller, but also lays down an interdict against such orders being questioned in any Court of Law except in the manner provided

1. (1968) 1 M.L.J. 435.

under section 25 of the Act. Section 25 runs thus:—

> "The High Court may, on the application of any person aggrieved by an order of the Appellate Authority, call for and examine the record of the appellate authority, to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the High Court that any such decision or order should be modified, annulled reversed or remitted for reconsideration, it may pass orders accordingly".

Under section 25 (1), provision is made for the High Court calling for and examining the record of the appellate authority as well as the regularity, correctness, legality or propriety of any decision or order passed therein. Very wide are the powers of the High Court in revising such orders as it is open to the High Court to modify annul, reverse, or remit for reconsideration. A reading of sections 23 and 25 of the Act would indicate that as against the order of the Rent Controller, an appeal would lie under section 23 (1) (*b*) and against such an order, a revision would be competent and maintainable under section 25 of the Act. That is why section 23 (4) declares the finality of the decisions of the appellate authority and the Rent Controller and provides further that those orders cannot be called in question except as provided in section 25 of the Act. The effect of this provision is that if an appealable order has not been appealed against as contemplated under section 26 (1) (*b*) of the Act, that order attains finality. Likewise, an appellate order if not revised in the manner provided for under section 25 of the Act, cannot be later questioned in any Court of Law. In the present case, it is not in dispute that an appeal would lie against the *ex parte* order of eviction passed against the petitioner under section 23 (1) (*b*) of the Act. If such an order had not been appealed against in the manner and within the time provided for under section 23 (1) (*b*) of the Act, then under section 23 (4), such an order becomes final and cannot be questioned in any Court of Law. On this ground alone, it must be held that the petitioner has completely misconceived his remedy by coming to this Court under section 115 of the Code of Civil Procedure.

4. Yet another aspect may now be noticed. Section 115 of the Code of Civil Procedure provides for the exercise of the powers of revision by this Court with reference to cases decided by any Court 'subordinate to the High Court and in which no appeal lies thereto'. It has been uniformity held that the Rent Controller as well as the appellate authority are *persona designata* and are not Courts *stricto sensu* and therefore the revisional jurisdiction under section 115 of the Code of Civil Procedure cannot be strictly invoked by a tenant with reference to matters arising out of orders passed by the Rent Controllers as well as appellate authorities. The Act sets up a complete machinery for the investigation of those matters upon which the jurisdiction of the Controller to order eviction of a tenant depends and as provided for under section 23, the Act makes the orders final, subject only to a revision under section 25 of the Act. It would therefore, be not proper to fall back upon section 115 of the Code of Civil Procedure as if the Rent Controllers and appellate authorities functioning under the Act are civil Courts amenable and subject to the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

5. Reference may now be made to certain decisions which have a bearing on this question. In *Rai Brij Raj Krishna and another* v. *S. K. Shaw and Brothers*[1], the Supreme Court had to consider the maintainability of a suit questioning before the civil Court the correctness of the order of a Controller functioning under the provisions of the Bihar Buildings (Lease Rent and Eviction) Control Act (III of 1947). An application was filed for an order of eviction against the tenants for having fallen into arrears of rent for the months of March, April and May, 1942. In spite of the fact that the tenants, who had earlier sent the rent by money order which was returned, had deposited the rent upto the period in question, the Rent Con-

1. 1951 S.C.R. 145: 64 L.W. 366: 1951 S.C J. 238: A.I.R. 1951 S.C. 115.

troller passed an order for eviction against the tenants holding that by reason of the non-payment of the rent, they had rendered themselves liable to be evicted. On appeal to the Commissioner, the order of the Rent Controller was upheld and thereupon the tenants filed a suit questioning the validity of the order of the Controller. The suit was dismissed and the dismissal was also confirmed on appeal. But on further appeal to the High Court of Patna, the High Court decreed the suit. Thereafter the landlord preferred a further appeal to the Supreme Court. The Supreme Court referred to section 18 of that Act providing for an appeal to an aggrieved person against the order of the Controller and relied upon section 18 (3) as well to the effect that the decision of the Commissioner and subject only to such decision, an order of the Controller shall be final and shall not be liable to be questioned in any Court of Law whether in a suit or other proceeding by way of appeal or revision and ultimately held that the Act had entrusted the Controller with a jurisdiction to find non-payment and to order eviction and that even if the Controller may be assumed to have wrongly decided the question of the non-payment of rent, which by no means is clear, his order cannot be questioned in a civil Court. Again in *Central Bank of India* v. *Gokal Chand*[1], the Supreme Court had occasion to construe section 38 (1) of the Delhi Rent Control Act (LIX of 1958) which reads thus:—

> "An appeal shall lie from every order of the Controller made under this Act to the Rent Control Tribunal (hereinafter referred to as the Tribunal) consisting of one person only to be appointed by the Central Government by notification in the Official Gazette".

The question that arose before the Supreme Court was whether the dismissal of an application by a tenant for the issue of a Commission was appealable under section 38 (1) referred to above. The Tribunal held that no appeal lay under section 38 (1) of the Delhi Rent Control Act (LIX of 1958) from the order of the Rent Controller refusing the issue of a Commission. The High Court also expressed its agreement with this view and thereupon the tenant appealed to the Supreme Court by special leave. In dealing with the scope of the right of appeal under section 38 (1) of the Delhi Rent Control Act, 1958, the Supreme Court observes thus:—

> "The object of section 38 (1) is to give a right of appeal to a party aggrieved by some order which affects his right or liability. In the context of section 38 (1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties. In a pending proceeding the Controller may pass many interlocutory orders under sections 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties. The Legislature could not have intended that the parties would be harassed with endless expense and delay by appeals from such procedural orders. It is open to any party to set forth the error, defect or irregularity, if any, in such an order as a ground of objection in his appeal from the final order in the main proceeding. Subject to the aforesaid limitation, an appeal lies to the Rent Control Tribunal from every order passed by the Controller under the Act. Even an interlocutory order passed under section 37 (2) is an order passed under the Act and is subject to appeal under section 38 (1) provided it affects some right or liability of any party. Thus, an order of the Rent Controller refusing to set aside an *ex parte* order is subject to appeal to the Rent Control Tribunal (underlining mine). Similar considerations have induced the Courts to give a limited construction on the apparently wide words of other statutes conferring rights of appeal. Section 202 of the Indian

1. (1967) 2 S.C.J. 828: (1967) 1 S.C.R. 310: A.I.R. 1967 S.C. 799.

Companies Act, 1913 confers a right of appeal 'from any order or decision made or given in the matter of winding up of a company by the Court'. In *Shankarlal Aggarwal* v. *Shankarlal Poddar*[1], this Court decided that these words, though wide, would exclude merely procedural orders or those which did not affect the right or liabilities of parties"'.

These observations of the Supreme Court are apposite and are clearly applicable to the instant case. The refusal of the Rent Controller to set aside the *ex parte* order of eviction by the dismissal of the application to set aside the *ex parte* order for non-payment of costs within the time granted was an order which was subject to an appeal to the appellate authority and therefore could not be revised under section 115 of the Code of Civil Procedure.

6. Natarajan, J., in S.R. No. 55328 of 1979, dated 17th August, 1979, had occasion to consider a similar question with reference to the maintainability of a civil revision petition at the instance of a tenant against the order of the Rent Controller refusing to re-issue the warrant of commission to a Commissioner appointed in the proceedings. The learned Judge held that no doubt the Rent Controller had been conferred powers of a civil Court under section 18-A of the Act in matters relating to the appointment of a Commissioner in any proceedings pending before him, but that such conferment will not convert the Rent Controller into a civil Court and therefore the Rent Controller cannot be equated to a civil Court to enable the High Court to entertain a civil revision petition under section 115 of the Code of Civil Procedure. It was also further pointed out by the learned Judge, after referring to the decision of the Supreme Court referred to already, that the remedy of the aggrieved party in such circumstances would be to ventilate his grievances regarding such an order in the appeal preferred by him against the final order passed by the Rent Controller. Ultimately the learned Judge held that a revision will not lie and directed the papers to be returned to the counsel on record. However, in *Arunachalam* v. *Lt. Col. Srinivasan*[1], Justice Ramaprasada Rao, as he then was, had occasion to deal with a similar objection. In that case, the landlord filed an application under section 14 of the Act which was dismissed for default and later restored on an application supported by an affidavit sworn to by the advocate for the landlord. Against that order, a civil revision petition was filed to this Court. An objection was raised with reference to the maintainability of the civil revision petition which was dealt with by the learned Judge in the following terms:—

> "Learned counsel for the respondent however states that no civil revision petition can be entertained against an order made by the Rent Controller under rule 18 (3). It is suggested that as an appeal lay against an order passed by the Rent Controller under rule 18 (3), a revision against the said order of the Rent Controller ought not to be entertained. Section 25 is one amongst many sections in the Madras Buildings Act, 1960 which Act itself is a beneficial piece of legislation. It cannot assumed or presumed by necessary implication that the jurisdiction of this Court as a revisional Court otherwise than under section 25, of the Madras Buildings Act, 1960, would be excluded by reason of an express provision like section 25 of the Madras Buildings Act. Mr. G. N. Chari would also put it on the ground that this civil revision petition can be entertained by this Court under section 115 of the Code of Civil Procedure. In my opinion, section 115 of the Civil Procedure Code, and section 25 of the Madras Buildings Act, are mutually exclusive and the revisional jurisdiction of this Court under section 115, Civil Procedure Code, is always available to interfere with an order of the kind before me. I am therefore satisfied that he civil revision petition is maintainable".

Apparently, the learned Judge's attention was not drawn to the judgment of the Supreme

1. (1965) 35 Comp. Cas. 1: (1964) 1 S.C.R. 717 at 736: A.I.R. 1965 S.C. 507 at 514.

1. (1968) 1 M.L.J. 435.

Court referred to earlier, as otherwise, the learned Judge would have concluded that the proper remedy of the landlord petitioner even in that case would only be an appeal under section 23 (1) (*b*) of the Act and not by way of a civil revision petition under section 115 of the Code of Civil Procedure. The scope and effect of section 23 (4) of the Act also do not appear to have been brought to the notice of the learned Judge which declares the finality of proceedings before the Rent Controller as well as the appellate authority and they being liable to be questioned only in the manner provided for under section 25 of the Act which, in my view, as stated already, leaves no room for any doubt with reference to the applicability of the order passed in that case as well as in the present case. Further, the learned Judge also does not appear to have envisaged the possibility of section 23 (1) (*b*) and section 25 of the Act being rendered dead letters, if a revision against every order of the Rent Controller as well as the appellate authority is entertained under section 115 of Code of Civil Procedure. Though the inapplicability of the jurisdiction of this Court under section 115 of the Code of Civil Procedure, cannot be a matter of either assumption or presumption as stated by the learned Judge, yet in view of the specific statutory provisions referred to already, such a conclusion is inevitable and the orders of the Rent Controller or the appellate authority constituted under the Act cannot be questioned under section 115 of the Code of Civil Procedure. As pointed out already, the Act is a self-contained Act containing provisions for appeal as well as revision and enabling an aggrieved party to challenge the correctness of orders passed by the authorities under the Act in the manner provided thereunder and no more. Consequently, resort to section 115 of the Code of Civil Procedure in matters or proceedings arising out of the provisions of the Act cannot be had to test the correctness of the orders passed under the Act. Therefore, it may not be appropriate even to characterise the provisions of section 115 of the Code of Civil Procedure and section 25 of the Act as mutually exclusive and to hold that the revisional power under section 115 of the Code of Civil Procedure, is always available even with reference to the matters arising under the provisions of the Act under which special, but limited provisions are made to question the correctness of orders passed under the provisions of that Act. In view of these considerations, the civil revision petition filed by the petitioner purporting to be under section 115 of the Code of Civil Procedure, cannot be entertained in this Court and consequently has to be dismisssed.

7. Even on the merits, the petitioner has not made out any case. The Rent Controller had, in the exercise of his discretion, imposed a condition on the petitioner that he should pay a sum of Rs. 25 as costs on or before 16th July, 1980 and this order was passed on 8th July, 1980, and the petitioner had ample time to pay this paltry amount. However, the petitioner did not choose to avail himself of the opportunity so afforded and did not pay the costs as directed. The Rent Controller had, therefore, no other option except to dismiss the application. The exercise of the discretion initially and the later dismissal of the application by the Rent Controller for non-compliance with the conditions imposed are perfectly in order and cannot be said to suffer from any infirmity or illegality. Therefore, the dismissal of the application filed by the petitioner in I.A. No. 3 of 1979 is sustainable even otherwise on the merits. Consequently, the civil revision petition fails and is dismissed with costs.

R.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Perumalswamy Mudaliar .. *Appellant**

v.

R. Arumugham and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), (*as amended by Act CIV of* 1976), *Order* 33, *rule* 1 (a), Explanation—*Suit filed as an indigent person — Subject-matter of the suit, whether can be considered in deciding the means to pay the court-fee.*

According to the *Explanation* to rule 1 (*a*) of Order 33 of the Code of Civil Procedure, while deciding the question whether the petitioner who seeks to institute a suit as an indigent person has sufficient means or not, the subject-matter of the suit is to be excluded. [*Para.* 4]

In the instant case, it has not been shown by the first respondent that apart from the suit properties there is any other immovable property owned or possessed by the appellant. As the appellant has not been shown to own or possess any property other than the properties covered by the suit which are to be excluded,the appellant has to be granted leave for instituting the suit as an indigent person. [*Para.* 5]

Case referred to :—

Fakruddin v. *Iqbal Ahamed*, A.I.R. 1957 All. 680.

Appeal against the order of the Court of the Additional Subordinate Judge, Vellore dated 28th February, 1978 and made in O.P. No. 139 of 1977.

S. Rajaraman for *M. N. Padmanabhan*, for Appellant.

B. Ram Mohan, for Respondent

The Court made the following

ORDER.— This appeal is directed against the order of the lower Court rejecting the appellant's petition for leave to institute the suit as an indigent person.

2. The appellant has filed a suit for cancellation of two settlement deeds executed by him in favour of his wife and son. The court-fee payable on the plaint comes to Rs. 3,001. The appellant, in his application for permission to institute the suit as an indigent person, claimed that he has no property other than the properties covered by the suit and therefore be should be permitted to sue as an indigent person.

3. However ,the application for permission to sue as an indigent person was opposed by the first respondent herein, who is no other than the son of the appellant. His case was that the appellant is in possession of the house and other landed properties covered by the two settlement deeds, deriving much income therefrom and that apart from this, he is also doing money-lending business. It was also alleged by him that immediately after retirement, the appellant got about Rs. 18,000 as Provident Fund and Gratuity from the B.&.C. Mills and therefore the appellant cannot be given leave to institute the suit as an indigent person.

4. The Court below, relying on the decision of the Allahabad High Court in *Fakruddin* v. *Iqbal Ahamed*[1], held that the subject-matter of the suit can also be taken into consideration in ascertaining the means of the petitioner if it is in his possession and yielding income. It has been held in the said decision that when the Court has to consider whether the plaintiff is not entitled to property worth Rs. 100 the subject-matter of the suit is to be ignored, but it does not follow that it has got to be ignored, in other cases in which the Court has to consider whether the plaintiff has sufficient means to enable him to payhe fee, and that if he is in possession of the suit property or a part of it, it must certainly be taken into consideration in ascertaining his means, because the property is part of his 'means,' but the Court cannot go further and insist upon taking into consideration the subject-matter of the suit even when the plaintiff is not in possession of it. The Court

* A.A.O. No. 205 of 1978. 3rd October, 1980.

1. A.I.R. 1957 All. 680.

has also taken the view than the word 'means' is by no means identical with 'property' and that it would not have been quite appropriate to exclude the subject-matter of the suit from the scope of the 'means' and the court-fee is payable in cash, but it is not essential for a plaintiff to be in possession of so much of cash in order to be able to pay the fee, and that if he has sufficient means, he can raise the necessary cash for payment of the fee, in which case he cannot be declared as a pauper. Thus, the Court below after having held that the appellant has no property other than the properties covered by the suit intended to be filed, held that the subject-matter of the suit being a vast extent of property, the appellant cannot be allowed to sue as an indigent person. In this appeal, the learned counsel for the appellant relies on *Explanation* 1 introduced in rule 1 of Order 33 of the Code of Civil Procedure, by Central Act CIV of 1976, in support of his submission that the subjectmatter of the suit cannot be taken into account at all. That *Explanation* is as follows —

> "A person is an indigent person—
>
> (*a*) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or (*b*) where no such fee is prescribed if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit."

According to *Explanation* 1 (*a*) while deciding the question whether the petitioner who seeks to institute a suit as an indigent person has sufficient means or not, the subject-matter of the suit is to be excluded. In view of this specific provision, the decision in *Fakruddin* v. *Iqbal Ahamed*[1] which is directly opposed to the statutory provision above referred to, cannot be followed. That was a decision rendered in 1957, long before the amendment to Order 33, rule 1, Civil Procedure Code, which now specifically provides that the subject-matter of the suit has to be excluded from consideration while determining the question as to whether the petitioner seeking leave to institute the suit as an indigent person has sufficient means or not.

5. In this case, it has not been shown by the first respondent that apart from the suit properties there is any other immovable property owned or possessed by the appellant. Though an allegation has been made that the appellant, at the time of the retirement from B. & C. Mills, got a sum of Rs. 18,000 the appellant's case is that the said sum was utilised substantially for the purchase of some of the items of properties covered by the suit and therefore he has no cash on hand as at present. As the appellant has not been shown to own or possess any other property other than the properties covered by the suit, which are to be excluded the appellant has to be granted leave for instituting the suit as an indigent person.

6. The appeal is therefore allowed and O.P. No. 139 of 1977 on the file of Sub-Court, Vellore, filed by the appellant for leave to file the suit as an indigent person will stand allowed. There will be no order as to costs.

R.S. —— *Appeal allowed.*

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1. A.I.R. 1957 All. 680.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *A. Varadarajan, J.*

P. Karunakaran .. *Petitioner**

v.

V. M. Ponnuswamy Achari .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25 — *Evidence—Admissibility or otherwise of by trial Court — Revision filed against trial Court's ruling — Not desirable to admit revision — Mistake by trial Court, if any, to be rectified at the appellate stage — Civil Procedure Code (V of* 1908), *section* 115.

No progress can be made in the trial Court if civil revision petitions are admitted against the ruling given by the trial Court about the admissibility or otherwise of a particular piece of evidence, as the trial Court may have innumerable occasions to allow or disallow any particular piece of evidence during the trial of a suit or other proceedings. The mistake, if any, committed by the trial Court in the admissibility or otherwise of a particular piece of evidence can be rectified by moving the appellate Court in an appeal against the order or decree which may be passed ultimately by the Trial Court after taking into consideration or declining to take into consideration the particular piece of evidence. [*Para* 4]

Cases referred to :

Mt. Hubraji v. *Deputy Commissioner*, A.I.R. 1943 Oudh. 169; *Manavala Goundan* v. *Kumarappa Reddy*, (1907) I.L.R. 30 Mad. 326: 17 M.L.J. 313; *Naganna Nayudu* v. *Pattabhiramayya*, I.L.R. 51 Mad. 245: 27 L.W. 346: 54 M.L.J. 595; A.I.R. 1928 Mad. 475: *Deputy Commissioner* v. *Ram Harekh*, A.I.R. 1926 Oudh. 397; *Rahim Peray* v. *Mst. Jenti*, A.I.R. 1957 J. & K. 49; *A. Devasikamani Goundar* v. *M.A. Ahdamuthu Gounder*, (1956) 1 M.L.J. 457: (1956) 8 S.T.C. 265: (1957) 58 Crl.L.J. 258.

Petition under section 25 of Act XVIII of 1960 as amended Act XXIII of 1973 read with section 115, Civil Procedure Code, praying the High Court to revise the Decree of the Rent Controller (District Munsif, Villupuram), dated 18th September, 1980 and passed in No. R.C.O.P. 26 of 1979.

R. S. Venkatachari, for Petitioner.

The Court made the following

ORDER.— This revision petition has been filed against the ruling given by the Rent Controler, Villupuram, on the question whether an un-registered document can be received in evidence. Having regard to the view expressed by me that it is not desirable to admit civil revision petitions against the trial Court's ruling allowing or disallowing a particular piece of evidence, in view of the fact that the error, if any committed by the trial Court in admitting a particular piece of evidence or declining to admit such a piece of evidence, could be rectified in the appellate forum, Mr. R. S. Venkatachari the learned counsel for the petitioner drew my attention to three decisions. One of them is *Mt. Hubraji* v. *Deputy Commissioner, Fyrabad*[1] where the learned Judge has observed thus:

"A preliminary objection has been raised by the learned Assistant Government Advocate that this revision petition is not maintainable as the learned District Judge in passing the order in question did not act as a Court or a Civil Court subordinate to this Court. A reference has been made in support of this contention to *Manavala Goundan* v. *Kumarappa Reddy*[2] *Naganna Nayudu* v. *Pattaohiramayya*[3] and *Deputy Commissioner, Partapgar* v. *Ram Harekh*.[4] In the two Madras cases, the order in question was one passed by the District Registrar acting under the Registration Act. These cases have, therefore, no relevancy to the present case. The Oudh case does not deal with this point at all. All that was held in that case was that when an application under section 61 is made by the Collector to the Revision Court, no notice to the person liable is required to be issued. Although learned counsel for the appellant complained that the order was passed by the learned District Judge behind his back and without any notice

*C.R.P. No. 2865 of 1980. 7th November, 1980.

1. A.I.R. 1943 Oudh. 169.
2. (1907) I.L.R. 30 Mad. 326, 17 M.L.J. 313.
3. (1928) I.L.R. 51 Mad. 245: 27 L. W. 346 : 54 M.L.J. 595: A.I.R. 1928 Mad. 425.
4. A.I.R. 1926 Oudh. 397.

to him, he has not urged that the order on that account is void."

After making this observation, the learned Judge has held that the decision of the learned District Judge in that case was correct and must be upheld.

2. That is not a case where a revision petition has been admitted against a trial Court's ruling on the question of admissibility or otherwise of any piece of evidence.

3. The next decision to which my attention was drawn by Mr. R. S. Venkatachari is of Shahmiri, J. in *Rahim Peray* v. *Mst. Jenti*[1] where the learned Judge has held that a revision lies against an interlocutory order of a Munsif determining the nature of the document produced by the plaintif and admitting it in evidence on payment of duty and penalty under proviso (1) to section 35. The learned Judge observed thus :

"A preliminary objection was raised by the learned counsel for the non-applicant that the revision was not the proper remedy for the applicant and that under section 39 of the Stamp Act the plaintiff could approach the Collector and obtain refund of the whole penalty if his objection was well-founded. I am not clear if section 39 would apply in this case as the document has not, in fact, been impounded by the trial Court.

The next point taken by counsel for the non-applicant is that under section 61 of the Stamp Act the Court to which appeals lie from or references are made by, trial Court can take such order into consideration and, therefore, the applicant should move the District Court. I however, do not see anything in section 61 of the Stamp Act which could prevent this Court from exercising its revisional jurisdiction in the matter. I am supported in this conclusion by *Mt. Hubraji* v. *Deputy Commissioner, Fyzabad*[2] to which my attention has been drawn by the learned counsel for the applicant.

The relevant provision in section 61 of the Stamp Act was considered by the Oudh Chief Court and it was held that there was no reason to think that the word 'Court' as used in Chapter VI of the Stamp Act in which section 61 is included has any meaning other than that which the same word bears in section 115, Civil Procedure Code. The heading of the Chapter, namely, Reference and Revision, supports the conclusion that the power of the High Court in this respect, which it has under section 115, Civil Procedure Code remains unaffected. The preliminary objection is, therefore, overruled."

The last decision to which my attention was drawn by Mr. R. S. Venkatachari is that of Rajamannar, CJ., reported in *A. Devasikamani Gounder* v. *M. A. Andamuthu Gounder and others*[1]. In that case, a preliminary objection was raised on behalf of the defendants that the suit agreement itself amounted to a regular instrument of partition and not having properly stamped and registered, it was invalid and not admissible in evidence for any purpose whatsoever and a suit based on such a document was not maintainable. There was a preliminary issue raised. The preliminary issue raised read thus :

'Whether the document dated 7th January, 1947, is not valid in the absence of registration and proper stamp?"

The learned Subordinate Judge of Coimbatore held that the document, though styled an agreement, was itself a deed of partition by which the joint owners divided their property in severalty and was therefore liable to stamp duty under Article 45 of the Indian Stamp Act. He further held that it followed that under section 35 of the Indian Stamp Act the document could not be admitted in evidence for any purpose unless proper stamp duty and penalty was paid. He did not decide the question whether the instrument was one falling under section 17 of the Indian Registration Act and so could not be admitted in evidence under section 49 of that Act. He thought that question could be considered only after the plaintiff had paid the stamp duty and penalty on the instrument. The Civil revision petition had been filed to have that order revised.

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1. A.I.R. 1957 J. & K. 49.
2. A.I.R. 1943 Oudh. 169.

1. (1956) 1 M.L.J. 457 : (1956) 8 S.T.C. 265 : (1957) 58 Crl. L.J. 258.

4. I am of the opinion that this decision does not apply to the facts of the present case where the ruling on the admissibility or otherwise of the document has been given by the Rent Controller not 'on any preliminary issue or point framed by him which would have the effect of completely disposing of the matter before him one way or the other. I am of the opinion that no progress can be made in the trial Court if civil revision petitions are admitted against the ruling given by the trial Court on the admissiblity or otherwise of a particular piece of evidence, as the trial Court may have innumerable occasions to allow or disallow any particular piece of evidence during the trial of a suit or other proceeding. The mistake if any committed by the trial Court in the admissibility or otherwise of a particular piece of evidence can be rectified by moving the appellate Court in an appeal against the order or decree which may be ultimately passed by the Trial Court after taking into consideration or declining to take into consideration the particular piece of evidence. The C.R.P. is therefore dsimissed.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Janaki Ammal .. *Appellant**

v.

Alagar Kothan .. *Respondent.*

Tamil Nadu Debt Relief Act (*XXXVIII of* 1972), *section* 15 — *Limitation of* 6 *months prescribed in section* 15 (1) — *Applicable to both judgment-debtor and decree-holder.*

The plaintiff in Original Suit No. 575 of 1972 obtained a decree on 9th March, 1973. The defendant filed an application on 25th December, 1973, for amendment of the decree and for sealing down the debt under section 15(1) of Act XXXVIII of 1972 which had been published on 15th December, 1972. The lower Court allowed the application. The plaintiff filed an appeal and contended that the application was barred by time.

Held: Having regard to the decision in *Panthanam Ammal* v. *Srinivasa Iyengar*, 92 L.W. 35 : (1979) 1 M.L.J. 253, the application filed by the respondent judgment-debtor on 25th December, 1973 under section 15 (2) of the Act which was admittedly beyond the period of six months from 16th December, 1972, the date of the publication of the Act as provided in section 16 (1) should be taken to be barred by time.

[*Para.* 6.]

Cases referred to :—

Ramakrishna v. *Kandasami Thevar*, (1975) 88 L.W. 255; *Annamalai* v. *Saraswathi Ammal*, (1978) 2 M.L.J. 447: 91 L.W. 642; *Panthanam Ammal v. Srinivasa Iyengar*, (1979) 1 M.L.J. 253 : 92 L.W. 35 : (1978) T. L. N. J. 239.

Appeal against the order of the Sub-Court, Madurai dated 30th November, 1976, in I.A. No. 1242 of 1973 in O.S. No. 575 of 1972.

S. G. Krishnamurthi for *N. Sivamani* and *Krishna Mitra*, for Appellant.

K. Sarvabhauman, for Respondent.

The Court made the following

ORDER.—The appellant herein is the decree-holder in O S. No. 575 of 1972 and

* A.A.O. No. 394 of 1978.

25*th November*, 1980.

he obtained a decree in the said suit on 9th March, 1973. The respondent herein who is the judgment-debtor, filed an application on 25th December, 1973, for amendment of the decree and for scaling down the debt under section 15 (1) of Tamil Nadu Debt Relief Act (XXXVIII of 1972) hereinafter referred to as the Act), which had been published on 16th December, 1972. The said application was resisted by the decree-holder contending that the judgment-debtor is not a debtor as defined in the Act and therefore, he is not entitled to claim the benefits of the Act and the decree is is not liable to be scaled down.

2. The Court below held that the respondent-judgment-debtor was a debtor as defined in the Act and therefore, he is entitled to maintain the application under section 15 (1) of the Act for amendment of the decree and for scaling down the debt. The decision of the Court below has been challenged in this appeal by the appellant, who is the decree-holder on the ground that the application having been filed by the judgment-debtor more than six months after the date of the publication of the Act, the same should be taken to be barred by time. Though this point does not appear to have been raised before the Court below, the point being one related to limitation, the same has to be considered by this Court.

3. According to the learned counsel for the appellant, the period of six months prescribed in section 15 (1) of the Act, applies both to the judgment-debtor as well as to the decree-holder while the contention on behalf of the respondents is that the limitation of six months prescribed in the said section applies only to the decree-holder and not to the judgment-debtor. Having regard to these rival submissions, it is necessary to scan through section 15 (1) of the Act, which is as follows—

> "15 (1). Where before the publication of this Act a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment debtor who is a debtor within the meaning of this Act, or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application the decree-holder within six months from the date of publication of this Act, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 amend the decree accordingly or enter satisfaction, as the case may be."

Under section 15 (2), the said limitation of six months applies even to decrees passed after the date of publication of the Act. Construing the said provision, N. S. Ramaswami, J. held in *Ramakrishna v. Kandasami Thevar*[1], that the limitation of six months prescribed therein applies only to an application by a decree-holder and not to an application by the judgment-debtor or a member of a joint family in the case of a Hindu joint family debt. According to the learned Judge, a true grammatical construction of section 15 (1) would lead to this conclusion, as there is no comma after the words 'on the application of a decree-holder' which means that the subsequent clause 'within six months from the date of publication of Act' has to be tacked on to the clause on the application of the decree-holder and therefore the said six months period would not be attracted to the earlier clause in the said section which deals with applications by judgment-debtors.

4. Construing the same provision, Balasubrahmanyan, J. in an unreported decision, *Annamalai v. Saraswathi Ammal*[2], held, differing from N. S. Ramaswami, J. that the normal construction of the provision does not make a distinction or discrimination between an application filed by a judgment-debtor and an application filed by a decree-holder and the absence of a comma cannot be relied on for imputing any such discrimination to the Legislature.

5. The conflict in the above two decisions has since been resolved by a Division Bench of this Court in *Panthanam Ammal v. Srinivasa Iyengar.*[3] The Bench expressed the view that a reading of section 15 (1) of the Act will clearly show that the section prescribed a period of limitation of six months for filing an application under that provision for amendment of the decree, that there is

1. (1975) 88 L.W. 255.
2. 91 L.W. 642: (1978) 2 M.L.J. 447.
3. 92 L.W. 35: (1979) 1 M.L.J. 253: (1978) T.L.N.J. 239.

absolutely nothing in the section or in the Act, to indicate as to why there should be a discriminatory treatment between an application by a judgment-debtor and an application filed by a decree-holder and that on the other hand, a perusal of the different provisions of the Act will show that it is the scheme of the Act itself which provides a period of six months as the period of limitation for a judgment-debtor to file an application for amendment the decree. After dealing with the scope of section 14 and section 18 of the Act, the Bench observed that the period of limitation prescribed in section 15 (1) will apply not only to an application filed by a decree-holder but also to an application filed by a judgment-debtor. The Bench also took the view, that the absence of presence of a punctuation mark cannot have the effect of distorting the statutory provision, that though a punctuation mark may be of assistance in the case of ambiguity, it cannot have a controlling effect in the construction of a statutory provision and that so long as the language is clear and the purport of the statutory provision is unambiguous the absence or presence of a punctuation mark is immaterial. In this view the Bench approved the view of Balasubrahmanyan, J., and disagreed with the view expressed by N. S. Ramaswami, J.

6. Having regard to the said decision of the Bench, the application filed by the respondent-judgment-debtor on 25th December, 1973, under section 15 (2) of the Act, which is admittedly beyond the period of six months from 15th December, 1972, the date of the publication of the Act as provided in section 15 (1) should be taken to be barred by time. In this view of the matter, it is unnecessary to go into the question as to whether the respondent judgment-debtor is a debtor as defined in the said Act. Even if the respondent is found to be a debtor as defined in the Act since the application filed by him under section 15 (2) of the Act is barred by time, he cannot get any relief. In this view of the matter, the appeal has to be allowed and the order of the Court below has to be set aside. The appeal is accordingly allowed. No costs.

S. J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*S. Padmanabhan, J.*

S. Arunachalam and others .. *Petitioners**

v.

The State of Tamil Nadu represented by the Commissioner and Secretary, Rural Development and Local Administration, Department, Fort St. George, Madras-9 and others .. *Respondents.*

Tamil Nadu Water Supply and Drainage Board Act (IV of 1971), sections 30 and 31 — Applicability.

The petitioners joined the Tamil Nadu Water Supply and Drainage Board as Junior Engineers. The Board was constituted in the year, 1970. Section 30 of the Tamil Nadu Water Supply and Drainage Board Act, provides that every person who immediately before the notified date was serving in connection with the affairs of the Department of Public Health Engineering and Municipal Works including the Office of the Chief Engineer under the Government shall as from the date be deemed to have been allotted to serve in connection with the affairs of the Board and shall cease to be an employee of the Government subject to two provisions. Section 31 of the Act provides that as soon as may be after the notified date, the Government may after consulting the Board direct by general or special order that such of the employees other than those employees referred to in section 30, serving immediately before the said date in connection with the affairs of the State as are specified in such order shall stand allotted to serve in connection with the affairs of the Board with effect from such date as may be specified in such order. Section 31 (*b*) of the Act provides that with effect on and from the date specified in the order under clause (*a*) the persons specified in such order shall become employees of the Board and shall cease to be employees of the Government.

*W.P. Nos. 1048 to 1051 of 1977.
4th November, 1980.

In 1977, the Government issued an order transferring respondents 3 to 8 to the control of the Board. The Government order further stated that the said respondents shall stand allotted to serve in connection with the affairs of the Board with effect on and from 19th March, 1977. In Board's proceedings dated 22nd January, 1977 the seniority of all the petitioners was recognised and they were included in the panel of names considered fit for promotion as Assistant Executive Engineers in the service of the Board. By proceedings dated 22nd March, 1977 in C3/76511/76-3 the petitioners were promoted temporarily as Assistant Executive Engineers in the Board. However, by Board's proceedings M.S.M. 110, dated 26th April, 1977, respondents 3 to 8 were promoted temporarily as Assistant Executive Engineers and the petitioners were reverted. Writ petitions were filed to quash the order of the Board.

Held, that the transfers and allotment of respondents 3 to 8 to the service of the Board has been specifically made under section 31 of the Act. The specified date is 19th March, 1973. In the circumstances, it goes without saying that the petitioners are entitled to claim seniority over respondents 3 to 8. Applying the principles laid down in the judgment in W. P. No. 1204 of 1977 (*N. Basheer Ahmed* v. *Government of Tamil Nadu*), the Writ Petitions were allowed.

[*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstancs stated therein, and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the order of the 2nd respondent contained in Board's Proceedings(A)M.S. No. 110, dated 26th April, 1977 and (B) C3/2916/76, dated 28th April, 1977 and quash the order in so far as it relates to the petitioner in each petition *viz.* W. P. Nos. 1048 to 1051 of 1977 respectively.

S. Sunder for *M/s. Aiyar* and *Dolia, Sunder* and *A. S. Thambuswami*, for Petitioners.

D. Krishnan, for Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioners joined the Tamil Nadu Water Supply and Drainage Board (hereinafter referred to as the Board) as Junior-Engineers. At the time the petitioners joined the service of the Board, the respondents were employees of the Board. It may be noted that the Board was constituted in the year 1971. Section 30 of the Tamil Nadu Water Supply and Drainage Board Act, 1970 (hereinafter referred to as the Act) provides that every person who immediately before the notified date is serving in connection with the affairs of the Department of Public Health Engineering and Municipal Works including the office of the Chief Engineer (Public Health Engineering and Municipal Works) under the Government shall as from that date be deemed to have been allotted to serve in connection with the affairs of the Board and shall cease to be an employee of the Government, subject to two provisos with which we are not concerned. Section 31 of the Act provides that as soon as may be after the notified date, the Government may after consulting the Board direct by general or special order that such of the employees other than those employees referred to in section 30 serving, immediately before the said date in connection with the affairs of the state as are specified in such order shall stand allotted to serve in connection with the affairs of the Board with effect on and from such date as may be specified in such order. We are not concerned with the proviso. Section 31 (*b*) of the Act provides that with effect on and from the date specified in the order under clause (*a*) the persons specified in such order shall become employees of the Board and shall cease to be employees of the Government.

2. On 6th January, 1977, the Government issued G.O. Ms. No. 32, Rural Development and Local Administration Department. By the said Government Order, respondents 3 to 8 were transferred to the control of the Board. The Government Order further stated that the said respondents shall stand allotted to serve in connection with the affairs of the Board with effect on and from 19th March, 1973.

3. It is not disputed that the petitioners in the writ petitions had joined the service of the Board from its very constitution in 1971 and on the basis of the date of appointment they are entitled to rank senior to respondents 3 to 8. In Board's proceedings

Ms. No. 17, dated 22nd January, 1977, the seniority of all the petitioners was recognised and they were included in the panel of names considered fit for promotion as Assistant Executive Engineers in the Board. By proceedings No. C3/76511/76-3, dated 22nd March, 1977, the petitioners were temporarily promoted as Assistant Executive Engineers in the Board. However, by Board's proceedings Ms. No. 110, dated 26th April, 1977, respondents 3 to 8 were promoted temporarily as Assistant Executive Engineers and the petitioners were reverted. In these circumstances, the writ petitions have been filed for the issue of writs of *certiorari* to quash the order of the Board dated 26th April, 1977.

4. The transfer and allotment of respondents 3 to 8 to the service of the Board has been specifically made under section 31 of the Act. The specified date is 19th March, 1973. In the circumstances, it goes without saying that the petitioners are entitled to claim seniority over respondents 3 to 8.

5. This conclusion of mine is supported by a decision of V. Ramaswami, *J.* in (*Basheer Ahmed* v. *Government of Tamil Nadu and others*)[1]. In that case, one Basheer Ahmed was a permanent employees of the Board. Some of the other persons who were made respondents to the said writ petition had not opted in the beginning to join the service of the Board as required under section 30 of the Act. Subsequently they were transferred to the Board and allotted to the service of the Board under section 31 of the Act. The question arose whether Basheer Ahmed was entitled to seniority over the other respondents who had been allotted to the service of the Board long after he joined the service V. Ramaswami, J. upheld the seniority of Basheer Ahmed. The learned Judge has observed as follows :—

"Section 31 of the Act enables the Government to direct by general or special order that such of the employees other than those employees referred to in section 30 serving immediately before the notified date in connection with the affairs of the State as are specified in each order shall stand allotted to serve in connection with the affairs of the Board with effect on and from such date as may be specified in such order. It may be seen from those two provisions of section 30 and 31 that those, who shall be deemed to have become the employees of the Board under section 30, become the employees with effect from the notified date, namely, 14th April, 1971. The power under section 31 could be exercised by the Government only after the notified date in respect of the employees other than those who have become employees under section 30. Naturally, therefore, when they are allotted subsequent to the notified date in the service of the Board, they will have to be taken as Juniors to the petitioners and those who were in service as from the date of original formation of the Board by reason of section 30. The seniority will, therefore, have to be determined with reference to the date on which the particular employee has become a member in the service of the Board. If that is so, the petitioner is senior to all of the respondents 3 to 7 and therefore, in the post of Executive Engineer, he will have to be given seniority over respondents 3 to 7".

The same principle applies to the petitioners in all these writ petitions. I therefore, hold that the petitioners are entitled to succeed and the impugned orders are quashed. There will be no order as to costs in the writ petition.

R.S. —— *Petition allowed.*

1. W.P. No. 1204 of 1977.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, CJ.* and *M. A. Sathar Sayeed, J.*

R. S. K. Chandrasekaran .. *Appellant**

v.

The Official Receiver, Madurai and another .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *section* 28 — *Secured creditor—Right to realise or deal with security not affected by section* 28 (2) *or* 28 (7).

A combined reading of sub-sections (2), (6) and (7) of section 28 of the Provincial

* L.P.A. No. 9 of 1976. 15*th December*, 1980.

Insolvency Act, will lead to the inference that in the case of a secured creditor his right to realise or otherwise deal with the security will not be affected by the vesting provided for in section 28 (2) or by the doctrine of relation back provided for in section 28 (7) of the Act. [*Para.* 3.]

Cases referred to :—

Babu Rama Changule v. *The Goodwill Bank Ltd.*, A.I.R. 1973 Bom. 342; *Raghava Reddy* v. *Official Assignee*, (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752: 77 L.W. 370: A.I.R. 1964 Mad. 549.

Appeal under Clause 15 of the Letters Patent against the Order of Justice N. S. Ramaswami dated 6th October, 1976, and made in C.M.A. No. 182 of 1975 preferred to the High Court, against the Order, dated 1st March, 1975 and made in E.A. No. 2 of 1975 in E.P. No. 232 of 1970 in O.S. No. 145 of 1968 on the file of the Court of the Subordinate Judge, Madurai.

Manicka K. Ramalingam and *A. Varadarajan*, for Appellant.

D. C. Krishnamurthy and *P. Viswanathan*, for Respondent.

The Judgment of the Court was delivered by

Ismail, CJ. — This is an appeal against the order of N. S. Ramaswami, J. dated 6th October, 1975 made in A.A.O. No. 182 of 1975. O.S. No. 145 of 1968 on the file of the Court of the Subordinate Judge of Madurai was a suit to enforce a mortgage and in that suit a decree was passed. E. P. No. 232 of 1970 was filed in that suit to execute the decree and the property was sold in auction on 1st November, 1971, and the appellant herein was the auction purchaser. The judgment-debtor filed E.A. No. 207 of 1972 under Order 21, rule 90 of the Code of Civil Procedure to set aside the sale, and that application was dismissed on 5th January, 1974. The appeal preferred by the judgment-debtors in A.A. O. No. 51 of 1974 to this Court also failed, as the same was dismissed on 13th August, 1974. In the meanwhile, a petition to adjudge the judgment-debtors insolvents was filed on 30th October, 1971, and the order of adjudication itself was made on 17th December, 1971. The Official Receiver, representing the estate of the insolvents, filed E. A. No. 2 of 1975 to set aside the sale on the ground that no notice was given to him and that the permission of the Court was also not obtained. The learned Subordinate Judge of Madurai passed an order on 1st March, 1975, dismissing the application, holding that the adjudication took place only on 17th December, 1971, that on the date when the sale took place, namely, 1st November, 1971, the Official Receiver was not in the picture, and that therefore there was no question of giving notice to him or obtaining the permission of the Court for the sale of the property. It was against this order of the learned Subordinate Judge that the Official Receiver filed A.A.O. No. 182 of 1975 before this Court. The learned Judge, (N.S. Ramaswami, J.) by his order dated 6th October, 1975, reversed the order of the learned Subordinate Judge of Madurai and allowed the appeal, A.A.O. No. 182 of 1975 allowed E.A. No. 2 of 1975 and set aside the sale. It is against this order the present appeal has been filed by the auction-purchaser.

2. The ground on which N. S. Ramaswami, J. reversed the order of the learned Subordinate Judge is that by operation of section 28 (7) of the Provincial Insolvency Act, the vesting of the property in the Official Receiver on the adjudication of the debtors as insolvents dated back to the presentation of the petition for adjudication, that in the present case it dated back to 30th October, 1971, that by virtue of this statutory provision the equity of redemption vested in the Official Receiver and that consequently the decree-holders could not have brought the property to sale without notice to the Official Receiver. The learned Judge, further held that section 51 (3) of the Provincial Insolvency Act, which corresponded to section 53 (3) of the Presidency Towns Insolvency Act, saved only those persons who had purchased the property in good faith, that in this case the auction-purchaser, namely, the appellant herein, had not filed a counter contending that he had purchased the property in good faith for consideration, and that therefore that question did not arise. It is the correctness of this conclusion of the learned Judge that is canvassed in the present Letters Patent Appeal.

3. Section 28 (2) of the Provincial Insolvency Act provides for the vesting of the property in the Official Receiver on the making of an order of adjudication, and it reads as follows :—

> "28 (2).—On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided and shall become divisible among the creditors and therefore, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

Section 28 (7) states :

> "An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made".

Sub-section (6) of section 28 states :

> "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed".

A combined reading of sub-sections (2), (6) and (7) of section 28 of the Act will lead to the inference that in the case of a secured creditor his right to realise or otherwise deal with the security will not be affected either by the vesting provided for in section 28 (2) or by the doctrine of relation back provided for in section 28 (7) of the Act. As we pointed out already, in this case the decree for the sale of the property must have been passed much earlier to 30th October, 1971, because the execution petition itself was filed in 1970. Even the order of the Court directing the sale of the property should have been passed much earlier to 30th October, 1971, because the sale actually took place on 1st November, 1971. Under these circumstances, the question for consideration is whether there is any reality in the requirement that the decree-holders should have obtained the permission of the Court for bringing the property to sale or should have given notice to the Official Receiver before obtaining an order for sale. Even giving full effect to the doctrine of relation back provided for in section 28 (7) of the Act, the order of the Court directing the sale of the property having been passed even before 30th October, 1971, it could not have been possible in practice for the decree-holders to have given notice to the Official Receiver or to have applied for and obtained the permission of the Court because on that date even the petition for adjudication was not there and more so the Official Receiver. Hence, looking at the problem purely from the practical point of view, it could not be contended that the sale which took place on 1st November, 1971, was liable to be set aside on the ground that the order for sale was made without notice to the Official Receiver and without the permission of the Court.

4. In our opinion, it is not even necessary to go so far, in view of the provision contained in sub-section (6) of section 28, that nothing contained in the section shall affect the power of any secured creditor to realise or otherwise deal with the security in the same manner as he would be entitled to, realise or deal with it, if that section had not been passed, and, when it so provides it proceeds to create a fiction that, with regard to the rights of a secured creditor referred to in sub-section (6) of section 28 neither sub-section (2) nor sub-section (7) of section 28 should be deemed to have been in existence or enacted. If so, there is no scope for applying either the provision of vesting or the theory of relation back, so as to restrain or curtail the power of the secured creditor saved under sub-section (6) of section 28.

5. Mr. D. C. Krishnamurthy, the learned counsel for the Official Receiver, brought to our notice the decision of the Bombay High Court in *Babu Rama Chaugule* v. *The Goodwill Bank Ltd., Miraj*[1]. In that case the Court had no occasion to consider the practical implications of the doctrine of relation back provided for in section 28 (7) of the Act. In that case a final decree in a mortgage suit was passed on 31st October, 1949.

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1. A.I.R. 1973 Bom. 342.

A petition for adjudication of the debtor as insolvent was made in 1960 and the actual order of adjudication was passed on 6th December, 1957. The execution petition with which the Bombay High Court was concerned was filed on 7th February, 1963. It was in that set up the question that came to be considered was whether the Official Receiver should have been made a party to the execution petition filed on 7th February, 1963. The Bombay High Court held that the only person to represent the estate of the judgment-debtor on 7th February, 1963, was the Official Receiver, that therefore he should have been made a party and that the execution proceedings instituted against the original judgment-debtor without impleading the Official Receiver, who alone represented the estate, were misconceived. It was in that context only that the Bombay High Court observed :

"To be more explicit, if a secured creditor has a right to sell the property through Court or privately, or to foreclose it, that right is not affected. The manner of enforcing the security, *viz.*, selling privately or through Court foreclosing through the same manner is also not affected. This does not mean that the secured creditor could deal with the property in the absence of any legal representation of that property. If by operation of law from the date of the adjudication the insolvent ceases to represent the property altogether and the only person that can represent that property and deal with it is the receiver appointed by the Insolvency Court, the secured creditor cannot ignore this fact. In other words, a devolution by the operation of law pending suit cannot be ignored by the secured creditor."

6. It is pertinent to point out that in the above case the Bombay High Court referred to the 'date of the adjudication', and not the 'date of the presentation of the petition for adjudication' with reference to the operation of section 28 (7) of the Act, and that is the reason why we pointed out that the Bombay High Court had no occasion to consider the scope of the doctrine of relation back provided for in section 28 (7) of the Act, on which alone N. S. Ramaswami, J. relied for reversing the conclusion of the learned Subordinate Judge.

7. N. S. Ramaswami, J. himself has relied on the decision of a Full Bench of this Court in *Raghava Reddy* v. *Official Assignee, Madras*[1]. That case was not concerned with a mortgage decree and therefore the learned Judges had no occasion to consider the exact scope of section 28 (6) of the Act. What the learned Judges, after elaborately considering the statutory provisions and some of the decisions, held was:

"To sum up, the title of a purchaser in an execution sale against a debtor, after the admission of a petition to adjudicate the latter as insolvent is a defensible title. If, the insolvency petition is dismissed he gets good title. If, however, an adjudication is made, his title would normally be displaced by the Official Assignee or Official Receiver, as the case may be, but this rule is subject to an exception in favour a of purchaser in good faith, who will be protected by reason of such good faith. Section 53 (3) being, therefore, an exception to the general rule of relation back of the Official Assignee's title, the operation of which makes the statutory title of the Official Assignee to give way before it, the burden of proving good faith will be on the person seeking advantage of the exception."

8. Having regard to the fact that the Full Bench was not considering a mortgage decree and therefore was not considering the scope of section 28 (6) of the Act, that decision has no application to the present case. Under these circumstances, the appeal is allowed, the order of N. S. Ramaswami, J. dated 6th October, 1975, is set aside and the order of the learned Subordinate Judge dated 1st March, 1975, is restored. There will be no order as to costs.

S.J. ——— *Appeal allowed.*

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1. (1964) 2 M.L.J. 168: I.L.R. (1964) 1 Mad. 752: 77 L.W. 370: A.I.R. 1964 Mad. 549 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Padmanabhan, J.*

A. K. Ahmed and Co., represented by its partner S. A. M. Janaludeen, Madras-1. ... *Petitioner**

v.

Regional Labour Commissioner (Central) Madras and another .... *Respondent*

Minimum Wages Act (XI of 1948), section 2 (b)—*Meaning of words "by or under authority of Central Government"—Firm undertaking construction of buildings—Contract entered with Central Warehousing Corporation for constructing godown—Action against firm under the Minimum Wages Act by Central Government, whether maintainable—Appropriate Government to take action under section 2* (b) *held to be the State Government.*

The petitioner-firm undertook constructions of buildings. The petitioner entered into a contract with the Central Warehousing Corporation for the construction of a godown and employed more than 100 workers. The Labour Enforcement Officer (Central) Madras-6 made an inspection and took action against the firm under the Minimum Wages Act. The petitioner challenged the action on the ground that the appropriate Government under section 2 (*b*) of the Act was the State Government which alone can take action against the firm.

Held, the appropriate Government within the meaning of section 2 (*b*) of the Act so far as this case was concerned, competent to take action against the petitioner for any violation of the Act was only the State Government and not the Central Government. [*Para.* 8.]

Cases referred to :—

C. M. W. M. Co. Ltd. v. *P. K. Sarkar* (1952) 1 Lab. L. J. 488 ; *Bharat Glass Works* v. *State of West Bengal,* (1958) 1 Lab. L. J. 467 : A. I. R. 1957 Cal. 347; *Rawel Singh* v. *Goil,* (1959) 2 Lab. L. J. 69 : A. I. R. 1959 M. P. 298; *Heavy Engineering* v. *State of Bihar,* (1969) 2 Lab. L. J. 549 : (1970) 1 S. C. J. 35 : (1969) 2 Comp. L. J. 273: A. I. R. 1970 S C. 882; *Polisett Lakshmayya,* In re, (1959) 1 Lab L. J, 556; *Khadi Gramudyog Sangh Muzaffarpur* v. *State of Bihar,* (1977) Lab. I. C. 466.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari fied mandamus* calling for the records in No. M. 26/23/78, E-2, dated 20th April, 1978 and 10th May, 1978 on the file of the Regional Labour Commissioner (Central) Labour Enforcement Officer (Central) Madras and quashing the same and further direct the respondents herein to refrain from instituting any penal or other action as specified in their communication No. M 26/23/78/E-2, dated 20th April, 1978 and 10th May, 1978.

P. V. Marthandan, for Petitioner.

K. Swamidurai Additional Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER.—The short question that arises for consideration in this writ petition is whether for the initiation of proceedings against the petitioner under the Minimum Wages Act, 1948, (hereinafter referred to as the Act), the appropriate Government is the Central Government or the State Government of Tamil Nadu.

2. The petitioner is a partnership firm and undertakes construction of buildings. The petitioner entered into a contract with the Central Warehousing Corporation, for the construction of a godown in the premises of the Golden Studio in Kodambakam, Madras. It is not disputed that the petitioner employs nearly 100 workers for the

*W.P. No. 2264 of 1978. 20th November, 1980

said construction. While so, the Labour Enforcement Officer (Central) Madras-6 inspected the premises on 20th April, 1978. As a result of the inspection the petitioner was informed by a communication, dated 20th April, 1978 that the petitioner had not complied with the provisions of the Act in the matter of payment of wages and over-time wages for the period 18th March, 1978 to 15th April, 1978. The petitioner then questioned the jurisdiction of the second respondent to take action in the matter. This was followed by a show-cause notice issued by the second respondent on 10th May, 1978 to the petitioner under section 20 of the Minimum Wages Act. In these circumstances, the petitioner has filed this writ petition for the issue of a writ of *certiorarified mandamus* to quash the notice issued by the respondent to the petitioner on 20th April, 1978 and 10th May, 1978 and to restrain from instituting any further action pursuant to the said orders.

3. Mr. Marthandam, learned counsel for the petitioner states that the appropriate Government which is competent to take action against the petitioner for violation, if any, of the provisions of the Act is the State Government and not the Central Government. According to Mr. Marthandam, the petitioner is a partnership concern carrying on business in the construction of buildings and the petitioner is not carrying on business under the authority of the Central Government.

4. On the other hand, Mr. Swamidurai, learned counsel for the respondents submits that inasmuch as the petitioner has entered into a contract with the Central Warehousing Corporation, which is established by the Central Government under the Statute, it is only the Central Government which will be the appropriate Government competent to initiate action in the matter.

5. In view of the short compass in which the dispute has narrowed down, it is unnecessary to deal with other points arising for decision in this writ petition. The only question for consideration is whether the Central Government is the appropriate Government within the meaning of section 2 (*b*) of the Act which is competent to initiate action against the petitioner in the instant case. Section 2 (*b*) of the Act reads as follows :—

"Appropriate Government" means :—

(*i*) in relation to any scheduled employment carried on by or under the authority of the (Central Government or a railway administration) or in relation to a mine, oil field or major port, or any corporation established by a Central Act, the Central Government, and

(*ii*) in relation to any other scheduled employment, the State Government".

Item (7) of the Schedule in Part I runs "Employment on the construction or maintenance of roads or in building operations." In order to confer jurisdiction on the Government under section 2 (b) the following conditions must be satisfied :—

The schedule employment must be carried on by or under the authority of the Central Government or a railway administration. The appropriate Government in relation to a mine, oil field or major port or any corporation established by a Central Act will be the Central Government. In relation to any other scheduled employment, the appropriate Government shall be the State Government.

6. It is not disputed that the petitioner is a partnership firm carrying on business in the construction of buildings. Admittedly, the petitioner does not carry on business by or under the authority of the Central Government. It is also not disputed that the petitioner is carrying on business for its own benefit. Inasmuch as the respondents have not taken the ground that the petitioner is carrying on business by or under the authority of the Central Government, it is unnecessary to go into the question as to what exactly is meant "by the words"

'by or under the authority of the Central Government". I am therefore, not going in detail into the following decisions which have been cited before me; *C. M. W. M. Co. Ltd.* v. *P. K. Sarkar and others*[1], *Bharat Glass Works* v. *State of West Bengal*[2], *Rawel Singh* v. *Gail*[3] *Heavy Engineering* v. *State of Bihar*[4] In re *Polisetty Lakshmayya*[5], and *Khadi Gramodyog Sangh Muzaffarpur* v. *State of Bihar*[6]. It may be mentioned that some of the cases refer to the interpretation of the words "by or under the authority of the Central Government" as used in the Industrial Disputes Act.

7. Admittedly, the contract entered into by the petitioner is with the Central Warehousing Corporation. It is the liability of the petitioner to comply with the provisions of the Minimum Wages Act, that we are concerned with. We are concerned here with the failure of the Central Warehousing Corporation to comply with the provisions of the Minimum Wages Act. If action were to be taken under the provisions of the Act by the respondents against the mine, oil field, or major port or any corporation established by the Central Government which would be the appropriate Government within the meaning of section 2 (*b*) merely because in this particular case the petitioner has entered into a contract with the Central Warehousing Corporation, which is a Corporation established by the Central Act, it cannot be said that for the violation of the provisions of the Act committed by the petitioner, it is the Central Government that will be the appropriate Government.

8. An argument was attempted on behalf of the respondents that the words "by or under the authority" appearing in section 2 (*b*) of the Act will also apply to mine, oil field, major port or any Corporation established by the Central Act. On a reading of the section, I have no hesitation to come to the conclusion that those words have been used in that section only in relation to the Central Government or railway administration and are not made applicable to a mine, oil field or major port or any Corporation established, by the Central Government. I therefore, hold that the appropriate Government within the meaning of section 2-A of the Act so far as this case is concerned, competent to take action against the petitioner for any violation of the Act is only the State Government and not the Central Government.

9. In the circumstances, the *rule nisi* is made absolute and the writ petition is allowed, but in the circumstances without costs.

S. J. —— *Petition allowed.*

1. (1952) 1 L.L. J. 488.
2. (1958 1 L. L. J. 467 : A.I.R. 1957 Cal. 347.
3. 1959 2 L. L J. 69 : A.I.R. 1959 M. P. 298.
4. (1969) 2 L L J 549: (1970) 1 S C. J. 35 : (1969) 2 Comp. L. J. 273 : A. I. R. 1970 S. C. 82.
5. (195?) 1 L.L. J. 556.
6. (1977) Lab. I. C. 466.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*P. R. Gokulakrishnan and P. Venugopal, JJ.*

Mrs. Premila Devi ... *Petitioner**

v.

R. Jayachandran, Sub-Inspector of Police, Pallipalayam Police Station, Pallipalayam, Erode and another ... *Respondents.*

(A) *Hindu Minority and Guardianship Act (XXXII of 1956), section 6* (a)—*Claim for custody of minor male child of tender age—Father having custody—Petition to issue writ of* certiorari—*Civil Court has jurisdiction to go into the question—Petition dismissed.*

* W. P. No. 34?3 of 1980. 12*th November,* 1980.

(B) *Constitution of India (1950), Article 226—Writ of* habeas corpus—*Alternative remedy available—Writ petition misconceived.*

Considering the decisions in several cases and bearing in mind the provisions of the Guardians and Wards Act and the Hindu Minority and Guardianship Act, the proper forum for the present case will be the Court constituted under the above two Acts and not the High Court exercising writ jurisdiction under Article 226 of the Constitution of India. The High Court's jurisdiction to grant relief under Article 226 of the Constitution can be invoked only in cases where the other remedies available will not be as effective and efficacious as the one sought to be invoked under Article 226. So far as the present case is concerned, as per law, the father is natural guardian. Technically the custody has to be with the mother if the child is below the age of five. It is only a preferential claim as between the father and mother as regards the custody of the child. There is no extraordinary circumstance in this case to relief under Article 226 of the Constitution of India. The relative merits of the claim for custody have to be discussed and decided after hearing the proper evidence that will be let in by the respective parties. This can be effectively done before the civil Court constituted under the Hindu Minority and Guardianship Act and also under the Guardian and Wards Act. The Court can give an effective and efficacious relief after assessing the evidence that may be let in by the respective parties regarding their preferential claims over the child concerned. Inasmuch as there is an effective alternative remedy available for the petitioner to agitate her claim, the writ petition filed under Article 226 of the Constitution is misconceived.

[*Paras.* 11 *and* 12.]

Cases referred to :—

Babubhai Patel v. *Madhavi Patel*, (1979) 1 M. L. J. 244 ; *Imtiaz Bano* v. *Masood Ahmed Jafri*, A. I. R. 1979 All. 25 ; *D. P. Sampath* v. *Govindammal* I. L. R. (1952) Mad. 468 : (1951) 2 M. L. J. 259 : 64 L W. 737 : A. I. R. 1952 Mad. 98 ; *Shaik Moidin* v. *Kunhadevi*, A. I. R. 1929 Mad. 33

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *habeas corpus* directing the respondents to produce the child, Hariharasudhan before this Hon'ble Court and to deliver him to the petitioner and set him at liberty.

R. Subramanian, for Petitioner.

V. Sridevan, the Respondents.

The order of the Court was made by

Gokulakrishnan, J. — This writ petition is for issue of a writ of *habeas corpus*, directing the respondents to produce the child, Harihara Sudhan, before this Honourable Court and to deliver him to the petitioner and set him at liberty. The petitioner has alleged in the affidavit in support of this petition that she got married to the first respondent on 3rd September, 1976. The second respondent is her mother-in-law. A male child was born on 20th May, 1979, and its name is Harihara Sudhan. The petitioner has further alleged that the first respondent herein, under the instigation of the second respondent and his sister, meted out cruel treatment to the petitioner and that the first respondent abused her stating that she has not brought enough dowry from her parents. The petitioner has further alleged that, subsequent to the birth of the child, Harihara Sudhan, the first respondent inflicted both physical and mental agony on the petitioner, that the respondents removed the child, who aged about eleven months at the time, forcibly from the petitioner on 27th April, 1980, that the petitioner was beaten severely by the first respondent and that the first respondent sent the child through the second respondent to Neyveli, where his father is employed as the Chief Security Officer, Neyveli Lignite Corporation

Limited. There is a specific allegation to the effect that, before sending the child with the second respondent they joined together and forced the petitioner to sign blank papers and, subsequently, sent the petitioner to Madras through one Police Constable by name M. Natesan. It is alleged by the petitioner that she is suffering very much due to the separation of her child and that the child, which is in the custody of the second respondent at Neyveli, must be given back to her. The petitioner has also stated that, as per section 6 (*a*) of the Hindu Minority and Guardianship Act, 1956, she is entitled to the custody of the child, since the child was only 11 months old. There is also an allegation in paragraph 10 of the affidavit in support of the writ petition that the petitioner apprehends danger to the child's life and health. With the above said allegations, the present writ petition was filed.

2. The first respondent has filed a counter-affidavit denying every one of the allegations mentioned in the affidavit in support of the writ petition, except those that were specifically admitted by him. As regards the marriage and the birth of the child, the first respondent has admitted the same. The first respondent flatly denied the allegation regarding the cruelty alleged to have been meted out by the first respondent to the petitioner. We do not think it is necessary to narrate the various idiosyncrasies of the petitioner alleged by the first respondent in his counter-affidavit. Suffice it to say that the child, according to the first respondent, is with his mother, the second respondent, from its birth and that it is the second respondent who is nurturing and protecting the child born to the petitioner, on 20th May, 1979. The first respondent has further alleged that the petitioner has refused to join him in spite of several requests and that she has not even cared to come and see the child. According to the first respondent, the second respondent, who is his mother, is staying with him and the child is also in his custody along with his mother, the second respondent. The first respondent has also stated that the petitioner has an alternative remedy available to her in law and that the present writ petition is misconceived.

3. The petitioner has come forward with a reply affidavit stating that she has also given birth to a female child on 7th October, 1980, and that the male child, who is a detenu now, was forcibly taken from her on 27th April, 1980, by the respondents herein. The petitioner has, no doubt, denied the various allegations referred to by the first respondent in his counter-affidavit.

4. The present writ petition is filed under Article 226 of the Constitution of India. This extraordinary remedy is always contemplated to give speedy, effective and efficacious remedy to the aggrieved party. If there is no such urgency, the ordinary course of law must take effect and this extraordinary jurisdiction cannot be resorted to. Thus, in given circumstances, the parties are at liberty to invoke the jurisdiction of this Court under Article 226 of the Constitution for necessary reliefs. We can presently discuss as to whether there is any urgency on the part of the petitioner herein to resort to the remedy under Article 226 of the Constitution. This is a case in which the petitioner, who is the mother of the tender child which was born on 20th May, 1979, wants its custody. According to her allegation, she was sent out of the respondents' house, after the male child was forcibly taken away from her on 27th April, 1980. Subsequently, that is, on 7th October, 1980, she has also given birth to a female child. No doubt, the petitioner has alleged that cruel treatment has been meted out to her while she was with the first respondent. As far as the tender child is concerned, for which a direction is prayed for, the first respondent has specifically alleged that from its date of birth, the second respondent, who is the mother of the first respondent, is taking care of the child and that the child is in the custody of his mother and himself.

5. No doubt, Mr. R Subramanian, learned counsel for the petitioner, after referring to section 6 of the Hindu Minority and Guardianship Act, 1956, states that th..

child, as per law, must be left in the custody of the petitioner herein. Section 6 (*a*) of the Act reads as follows :

> "The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property).
>
> (*a*) in the case of a boy or an unmarried girl the father, and after him, the mother ; provided that the custody of the minor who has not completed the age of five years shall ordinarily be with the mother."

6. The words "shall ordinarily be with the mother" is interpreted by stating that the child below the age of five must be with the mother and that, if such a child is left in the custody of some other person, it will be illegal. We are not able to subscribe to the interpretation that the custody of the child, below the age of five, if it is with the father, will *ipso facto* amount to illegal custody. In Funk and Wagnalls Standard Dictionary, the meaning for the word "ordinarily" is given as "in ordinary cases, commonly ; usually; normally".

7. Hence, the custody of the child, which is below the age of five may be normally given to the mother. But, if the custody of such child is with the father, it will not be illegal. The reference to custody, when the legal guardianship vests with the father as provided under section 7 of the Hindu Minority and Guardianship Act, 1956, clearly spells out the intention of the legislature to see that the interest of the minor is always taken into consideration for giving such custody. That is why, the words "ordinarily be with the mother" have been used. Further, such custody of the tender child to be with the mother is only a preferential claim and the fact that it is with the father cannot make such custody illegal.

8. Mr. Subramanian, learned counsel for the petitioner cited the decision in *Babubhai Patel* v. *Madhavi Patel*[1], wherein a Bench of our High Court has observed :

> "The only other aspect on which counsel cited authorities was for the position that the attachment that certain persons may develop for the child when the child happened to be with them for some time, must not also have too much weight with the Court in deciding the welfare of the child."

Thus, the Bench has held that attachment alone cannot be a criteria for deciding the welfare of the child. We have absolutely no hesitation in accepting this proposition. A child of tender age cannot have the same weighing its welfare between two persons. Hence the averment as if the child has developed attachment with the second respondent in our opinion, cannot have any weight in deciding the present petition The next case cited by Mr. Subramanian is the one reported in *Imtiaz Bana* v. *Masood Ahmed Jafri and others*[1]. In this case, the mother was preferred to have the custody of the infant sons. It is clear from the facts of this case that the father had sent out the mother of the infants and that he had also contracted another marriage with some other lady. As per Muslim law, the custody of the minor upto a certain age can only be with the mother. Considering all these aspects a single Judge of the Allahabad High Court gave the custody of the children to the mother. We do not think, the facts of this case will have any application to the present case on hand.

9. On the other hand, Mr. V. Sridevan, learned counsel for the respondents, cited the decision in *D. P. Sampath* v. *Govindammal and two others*[2]. In this case, a Bench of our High Court, dealidg with a writ of *habeas corpus* filed under section 491 of the Code of Criminal Procedure, wherein the petitioner who was the husband, wanted to get the custody of his wife aged about 17 years, observed :—

> "Though the custody in which the minor girl was kept might be technically illegal

1. (1979) 1 M. L. J. 244.

1. A I. R 1979 All. 25.
2. I. L. R. (1952) Mad. 468 : (1951) 2 M. L. J. 259: 64 L. W. 737 : A. I. R. 1952 Mad. 98.

in the sense that her husband as legal guardian was *prima facie* entitled to custody, the facts of the case did not justify the passing of an order under section 491 of the Code. The young woman, on the threshold of majority, had left her husband entirely of her own accord, disentitled with the treatment she was receiving from his mother and grand-mother. The petitioner in the case was seeking really to exercise his legal right as guardian of his minor wife. It was eminently a fit case where he should be referred for his relief to the provisions of the Guardians and Wards Act, and section 25 of that Act is specifically intended to give relief in such cases. Though the remedy under section 491, Criminal Procedure Code, is open to any legal guardian who claims custody of a ward, there must be satisfactory evidence that the ward is in illegal or improper custody of such a kind as to justify an energent order by a Criminal Court under that section. To take any other view would be to constitute a criminal Court under section 491, Criminal Procedure Code. into aGuardians and Wards Court acting under section 25 of the Guardians and Wards Act, which lays down certain considerations for the guidance of the Court in such matters.

10 To the same effect Mr. Sridevan cited another case, *Shaik Moidin* v. *Kunhadevi*[1], which was decided by a Full Bench of our High Court. In this case, the Full Bench observed:

"In these circumstances we think it is quite unnecessary to interfere and my learned brother Jackson has pointed out in the course of the argument that if the father wishes to assert his rrghts he can try to set the court in motion locally where the witnesses could be seen and if necessary cross-examined under section 25, Guardians and Wards Act. This application is dismissed."

1. A. I. R. 1929 Mad. 33.

In this Full Bench decision an application was filed by the father to issue a writ of *habeas corpus* directing that the custody of his son age about 7 or 8 years should be delivered to him.

11. Considering the decisions cited above and also bearing in mind the provisions of the Guardians and Wards Act and the Hindu Minority and Guardianship Act, the proper forum for the present case will be the Court constituted under the above said two Acts and not the High Court exercising writ jurisdiction under Article 226 of the Constitution of India. This Court's jurisdiction to grant relief under Article 226 of the Constitution can be invoked only in cases where the other remedies available will not be as effective and efficacious as the one sought to be invoked under Article 226. As far as the present case is concerned, we have already extracted the facts alleged by the respective parties in their affidavits. Excepting a bald statement to the effect that the petitioner apprehends danger to the child's life and health, there is absolutely no other allegation to spell out imminent danger to the life or the physical or moral well-being of the detenu concerned. According to the allegation it could be seen that the child is in the care and custody of the respondents herein as and from 20th May, 1979. Admittedly the child is in the custody of the respondents as on date. The petitioner has come out of the house of the respondents leaving the child as early as on 27th April, 1980. No doubt, various other allegations have been levelled against each other in their respective affidavits. These are all matters which can be effectively gone into in a properly instituted petition before the appropriate forum under the provisions of the Hindu Minority and Guardianship Act, 1956, as observed in *D. P. Sampath* v. *Govindammal and two others*[1] and in *Shaik Moidin* v. *Kunhadevi*[2], it is better for the petitioner to

1. I. L. R. 1952 Mad. 468: (1951) 2 M.L.J. 259.
2. A. I. R. 1929 Mad. 33 (F. B.).

invoke the jurisdiction of the Court under section 6 of the Hindu Minority and Guardianship Act, 1956 to have the custody of the child instead of invoking the jurisdiction of this Court under Article 226 of the Constitution.

12. We have already held that the custody of the child with its father as at present, cannot be termed as illegal. As per law, the father is the natural guardian. Technically the custody has to be with the mother if the child is below the age of five. It is only a preferential claim as between the father and mother as regards the custody of the child. We do not find any extraordinary circumstance in this case to give relief in this petition which is filed under Article 226 of the Constitution of India. The relative merits of the claim for custody have to be discussed and decided after hearing the proper evidence that will be let in by the respective parties. This can be effectively done before the Civil Court constituted under the Hindu Minority and Guardianship Act and also under the and Guardian and Wards Act. The Court only can give effective, efficacious relief after assessing the evidence that may be let in by the respective parties regarding their preferential claims over the detenu concerned. Inasmuch as there is an effective, efficacious alternative remedy available for the petitioner to agitate her claim, we feel that the writ petition filed under Article 226 of the Constitution is misconceived.

13. Considering all these aspects of the case, this writ petition is dismissed. No costs.

14. If any petition is preferred by the petitioner, before the Civil Court for the custody of the child, the civil Court shall dispose of such petition as expeditiously as possible

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

S. V. Muthu and others .... *Petitioners**

v.

Veerammal and another ... *Respondents*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 37 (2) and (3)—Scope and applicability —Suit for partition and separate possession—Preliminary decree passed—Certain amounts deposited in Court—Petition for withdrawwal of their share by defendants as per preliminary decree—Court-fee for partition and separate possession not paid by the defendants—Need to amend preliminary decree to include declaration of petitioner's rights.

Section 37 (3) of the Tamil Nadu Court-fees and Suits Valuation Act indicates that if, at the time of filing the written statement, the defendant claims partition and separate possession of his share of the property, then Court-fee becomes payable immediately, computed on half the market value of his share or at half the rate specified in section 37 (2) of the Act depending upon whether such defendant has been excluded from possession or is in joint possession. Section 37 (3) does not however provide for a case to enable a defendant after the passing of the preliminary decree to ask for separation of his share; but when all the parties are before the Court and the shares have not undergone any change, as in the present case, and the matter has not proceeded to a final decree, even after passing of the preliminary decree a defendant is permitted to seek a separation of his share of the properties by payment of Court-fee. It appears that section 37 (3) of the Act would apply even with reference to a case where a defendant seeks particular and separate possession of his share of properties after

*C. R. P. No. 824 of 1979. 19*th August*, 1980.

the passing of the preliminary decree but only so long as the final decree proceedings are pending. [*Para.* 4.]

If the preliminary decree already passed does not contain any declaration as to the rights of the defendants their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the defendants' share, they can, even after the passing of the final decree, take steps for actual separation of their share. [*Para.* 4.]

Cases referred to :—

Varada Appalanaidu v. *Bodu Annamnaidu and others*, A. I. R. 1928 Mad. 555; *Nil Govinda Misra* v. *Smt. Rukmani Debi*, A. I. R. 1944 Cal. 421; *Smt. Bittan Devi* v. *Rudra Sen Bajpai*, A. I. R. 1966 All. 601; *Lachmi Narayan Marwari* v. *Balmukund Marwari*, L. R. 51 I. A 321 : (1924) 47 M. L. J. 441 : 20 L. W. 491 : A. I. R. 1924 P.C. 198..

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Coimbatore dated 30th August, 1978 and made in I. A. No. 472 of 1978 in O. S. No. 213 of 1968.

N. Varadarajan, for Petitioners.

N. B. Chandran, for Government Pleader, for Respondents.

The Court made the following

ORDER.—Defendants 1 to 4 in O. S. No. 213 of 1968, Sub-Court, Coimbatore, are the petitioners in the civil revision petition, which is directed against the order dismissing an application filed by them praying for the issue of a cheque in a sum of Rs. 13,259-23 in favour of their counsel. The suit, O. S. No. 213 of 1968 was filed by the respondents herein for partition and separate possession of their share in the properties and on 4th August, 1971, a preliminary decree was passed against which an appeal was filed to this Court in A. S. No. 646 of 1972, which also stood dismissed. The petitioners claim that as per clauses (8) and (9) of the preliminary decree, they are entitled to a sum of Rs. 14,588-30 being the dividend due to the father of the petitioners from the 14th defendant in the suit who had deposited a sum of Rs. 13,704-60 into Court as per clauses (8) and (9) of the preliminary decree. The petitioners claim that out of this amount they are entitled to withdraw a sum of Rs. 13,259-23 and that the respondents are entitled to withdraw a sum of Rs. 445.37. It is on this ground the petitioners filed I. A. No. 472 of 1978 in O. S. No. 213 of 1968 praying for the issue of a cheque in favour of their counsel.

2. The respondents-resisted the application contending that the petitioners have not paid the Court-fee for partition and separate possession and hence, they are not entitled to ask for their share in the amount. It was also contended by them that the petitioners have to render accounts to them as well as the defendants 5 and 6 in the suit regarding the income derived by the petitioners from their share in accordance with clause (36) of the preliminary decree and therefore, the application has to be dismissed.

3. The learned Subordinate Judge, Coimbatore, held that though the preliminary decree had been passed on 4th August, 1971, yet, no steps whatever have been taken to pass a final decree and that no prejudice will be caused to the respondents, if payment out of the cheque is ordered. But, however, the learned Subordinate Judge held that the petitioners are entitled to withdraw the amount subject to payment of requisite court fee. Ultimately, the Court directed the payment of a sum of Rs. 13,259-23 in favour of the counsel for the petitioners, subject to the payment of requisite Court fee for this amount. It is the correctness of this order that is challenged in this civil revision petition.

4. The learned counsel for the petitioners contended that no Court fee is payable at all since, according to him, on the separation of the share of the respondents, the share of the petitioners also gets ascertained and separated and that there is no need, therefore, for the petitioners to pay Court fee on their share and pray for its separation as well. On the other hand, Thiru N. R. Chandran, learned Additional Government Pleader (II), contends that whenever the defendants ask for separation of their share of the properties, the Court fee is payable and such separation can also be sought for after the passing of the preliminary decree; but only so long as the final decree proceedings are pending and in the present case, the petitioners, after preliminary decree, are seeking a separation of their share and therefore, the Court fee is payable. The relevant section that is applicable to the present case is Section 37 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955 (hereinafter referred to as the Act).

The section reads as follows :

"37. *Partition Suits*—(1) In a suit for partition and separate possession of a share of joint family property or of property owned jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property owned jointly or in common by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates :

When the plaint is presented to :	
(*i*) a District Munsif's Court	Rupees Thirty
(*ii*) the City Civil Court, Madras or a Sub-Court or a District Court.	Rupees thirty if the value of plaintiff's share is Rs. 800 or less; Rupees one hundred if the value is above Rs. 5,000 but below Rs. 10,000 and Rupees two hundred if the value is Rs 10,000 and above.
(*iii*) the High Court	Rupees three hundred.

(3) Where in a suit falling under sub-section (1) or sub-section (2) a defendant claims partition and separate possession of his share of the property, fee shall be payable on his written statement computed on half the rates specified in sub-section (2), according as such defendant has been excluded from possession or is in joint possession.

(4) where, in a suit falling under sub-section (1) or sub section (2), the plaintiff or the defendant seeks cancellation of decree or other document of the nature specified in section 44, separate fee shall be payable on the relief of cancellation in the manner specified in that section."

Section 37 (3) indicates that if, at the time of filing the written statement, the defendant claims partition and separate possession of his share of the property, then the Court fee becomes payable immediately, computed on half the market value of his share or at half the rates specified in section 37 (2) of the Act depending upon whether such defendant has been excluded from possession or is in joint possession. It is this provision which had been taken advantage of by defendants 5 and 6 in the suit, who had prayed for in their written statement the separation of their shares and had also paid Court fee thereon and the preliminary decree declared their shares also.

Section 37 (3) of the Act does not, however, provide for a case to enable a defendant after the passing of the preliminary decree to ask for a separation of his share; but when all the parties are before the Court and the shares have not undergone any change, as in the present case, and the matter has not proceeded to a final decree, there cannot be any serious objection in principle, if a defendant, even after passing of the preliminary decree, is permitted to seek a separation of his share of the properties by payment of the court-fee. The contention of the learned counsel for the petitioners that no court-fee at all need be paid cannot be accepted as the Court separates on a request by the defendants their share of the properties as well It appears to me that section 37 (3) of the Act would apply even with reference to a case where a defendant seeks the partition and separate possession of his share of the properties after the passing of the preliminary decree, but only so long as the final decree proceedings are pending Indeed in *Varada Appalanaidu* v. *Bodu Annamnaidu and others*[1], a Bench of this Court consisting of Ramesam and Devadoss, JJ., held that separation of this share could be effected in execution as well. In that case, in a suit by one of three reversioners where the other two were made defendants 2 and 8 for a declaration that all the three were entitled to the suit property as reversioners and for partition and the recovery of one-third share of the suit property, an issue was raised whether plaintiff, defendants 2 and 3 were reversioners and the issue was decided in plaintiff's favour and the suit was decreed. The 3rd defendant filed another suit for his one-third share wherein the 1st defendant contended that the suit was unnecessary in view of the decree in plaintiff's suit and in the course of execution, the 3rd defendant applied for partition. It was held that it was not open to the 1st defendant to contend that the 3rd defendant was not entitled to ask for a decree for his share on payment of court-fees as in a partition decree and especially so in view of his objection in the suit by the 3rd defendant. In that case also, the final decree proceedings were pending and the Bench held that it was open to the 3rd defendant to ask for a decree for his share on payment of court-fee. It must be remembered that this decision had been rendered at a time when the Tamil Nadu Court-fees and Suits Valuation Act, 1955 was not in force, especially section 37 thereof. In *Nil Govinda Misra* v. *Smt. Rukmini Debi*[2], a Division Bench of the Calcutta High Court held that a co-sharer, be he or she a plaintiff or defendant in a suit for partition, is entitled to claim a separate allotment at any stage before the final decree and that there can be partition by metes and bounds even of those properties in which the plaintiff has no share but one or the other defendant claims separate allotment and a separate suit need not be brought for this purpose. In *Smt. Bittan Devi and others* v. *Rudra Sen Bajpai and others*[3], relied on by Mr. N R. Chandran it has been held that when in a suit for partition, the defendants apply for the preparation of final decree by separation of their share, they desire to be treated as co-plaintiffs and allotted their share separately and that plaintiffs and also defendants standing in the category of plaintiffs must pay court-fee before their prayer can be granted. It has also been further pointed out that stamp duty, if any, payable at the time of the passing of the final decree shall also be payable by them. Referring to the provisions of Order 20, rule 18 (2), Civil Procedure Code, it has been held that the courts of law generally lay down in the preliminary decree the plaintiff's share or rights in the property; but where the defendants desire that their share or interest to be also declared, the preliminary decree should contain such a declaration also. If the defendants' rights

1. A.I.R. 1928 Mad. 555.

1. A.I.R. 1944 Cal. 421.
2. A.I.R. 1966 All. 601.

have not been declared in the preliminary decree, the aggrieved party can challenge the decree in appeal or can apply for review. But once the preliminary decree contains a declaration as to the defendants' share, they can, even after passing of the preliminary decree, apply for and have their share partitioned on payment of court-fee etc., as may be necessary under the law. Indeed, the Privy Council has pointed out in *Lachmi Narayan Marwary* v. *Balmukund Marwary*[1], that after decree it is open to any party to a suit to whose interest it is that further proceedings be taken to initiate the supplementary proceedings, but in the ordinary case it is the plaintiff who moves. If the preliminary decree already passed does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the defendants, share, they can, even after the passing of the preliminary decree, take steps for the actual separation of their share. Indeed, in the instant case, no such steps have been taken by the petitioners to modify the preliminary decree in any manner for having their shares also declared and until such time, it is not open to the petitioners to claim that they are entitled to the amount in deposit. It is undoubtedly open to the petitioners to take such steps as they may be advised to have the preliminary decree amended in such a manner as to include a declaration of their rights as regards their share in the properties as well and only then they can seek payment of the amount in deposit Without doing so, on the basis of the preliminary decree as it now stands, the petitioners cannot seek to withdraw the amount in Court deposit on the ground that they are entitled to the same. The result is, the refusal of the Court below to direct payment out is, therefore, correct, though for different reasons. The civil revision petition fails and is dismissed. No costs.

1. (1924) 47 M.L.J. 44: 120 L.W. 491: L. R. 51 I.A. 321: A.I.R. 1924 P. C. 198.

5. The dismissal of this civil revision petition does not preclude the petitioners from taking such steps as may be open to them before the Court below for a declaration of their share of the properties by a supplementary preliminary decree, if need be, and on payment of the necessary court-fee under section 37 (3) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

T. K. Narayana Pillai ... *Appellant**

v.

Naganatha Iyer ... *Respondent.*

Tamil Nadu Occupants Kudiyiruppu (Conferment of Ownership) Act (XL of 1971), section 2 (6)—"Kudiyiruppu"—Lease or licence to enjoy should have been only in respect of site—Inapplicable to a pucca building which an agriculturist may take on lease.

By reason of the definition of "kudiyiruppu" contained in section 2 (6) of the Tamil Nadu Occupants Kudiyiruppu Act, the lease or licence to enjoy should have been only in respect of sites. The definition does not apply to a pucca building which an agriculturist may take on lease. By *Explanation I* to sub-section (8) of section 2 of the Act, a presumption is raised, *viz*, "any person occupying the kudiyiruppu is an agricultural labourer or an agriculturist until the contrary is proved". To hold that the site of any dwelling house or hut is a kudiyiruppu one has to ascertain whether the occupant either as a tenant or as a licensee is an agriculturist or an agricultural labourer. No presumption that any person is an agriculturist or an agricultural labourer can be made till the

*S. A. No. 1486 of 1977. 24th October, 1980.

site of the dwelling house or hut in his occupation is found to be a kudiyiruppu. Therefore the presumption raised by the explanation is of no avail to any party who claims to be an agriculturist merely on the basis of a contention that the site in his occupation is a kudiyiruppu. An agriculturist can claim that the site of the dwelling house or hut in his occupation is kudiyiruppu only if he is tenant or a licensee in respect of the site alone. [*Para.* 6.]

Appeal against the decree of the Court of the Subordinate Judge, Mayuram in Appeal Suit No. 109 of 1975 preferred against the decree of the Court of the District Munsif of Sirkali in Original Suit No. 741 of 1974.

V. Sridevan, G. Masilamani, R. Balachander and *G. Narasimhalu*, for Appellant.

S. Pichai and *R. Krishnamurthy*, for Respondent.

The Court delivered the following

JUDGMENT: - This is a second appeal from the judgment of the learned Subordinate Judge of Mayuram allowing A. S. No. 109 of 1975 and reversing the judgment and decree of the learned District Munsif of Sirkali in O. S. No. 741 of 1974.

2. The suit was instituted by the appellant against the respondent herein for eviction of the respondent from the building which the respondent had taken on lease on a monthly rent of Rs. 25. The respondent as defendant, contended *inter alia* that he is entitled to the benefits of the Tamil Nadu Occupants Kudiyiruppu (Conferment of Ownership) Act (XL of 1971) to be hereafter referred to as the Act). He also contended that there was a fresh tenancy arrangement between him and the plaintiff on 6th August, 1974 and that there was no valid notice to quit.

3. The learned District Munsif found that there was no such fresh tenancy arrangement between the plaintiff and the defendant on 6th August, 1974 as alleged by the defendant and that the notice to quit is proper and valid. He further held that the defendant is not an agriculturist and that he is not entitled to the benefits of the Act. He therefore decreed the suit for recovery of possession of the suit property with a sum of Rs 50 as damages for use and occupation. However on appeal the learned Subordinate Judge came to the conclusion that the defendant is entitled to the benefits of the Act, and, therefore set aside the judgment and decree of the trial court and dismissed the suit.

4. This second appeal has been admitted on two substantial questions of law formulated as follows.

1. Whether section 23 of Act XL of 1971 is a bar for the defendant to raise the contentions that he raised in the civil suit.

2. If the civil Court is competent to go into the question whether the defendant is entitled to the benefits of Act XL of 1971 then as per the provisions of the Act whether the defendant is a person entitled to the benefits?

5. I am of the opinion that the defendant is not entitled to the benefits of the Act, because what was lessed to him was not a site but a pucca building *viz.*, Door No. 90 in ward No. 3 of Achalapuram Village. Sirkali Taluk. Sub-section (6) of section 2 of the Act defines "Kudiyiruppu" as,

> "the site of any dwelling house or hut occupied either as tenant or as licensee by any agriculturist or agricultural labourer and includes such other area adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut."

6. By reason of this definition the lease or licence to enjoy should have been only in respect of a site. The definition does not apply to a pucca building which an agriculturist may take on lease. Incidentally I may mention that by *Explanation I* to sub-section (8) of section 2 of the Act., a presumption is raised, *viz.*, "any person occupying the kudiyiruppu is an agricultural labourer or an agriculturist until the contrary is proved". To hold that the site of any dwelling house or hut is a

Kudiyiruppu one has to ascertain whether the occupant either as a tenant or a licensee is an agriculturist or agricultural labourer No presumption that any person is an agricultural labourer can be made till the site of the dwelling house or hut in his occupation is found to be a Kudiyiruppu. Therefore, the presumption raised by the *Explanation* is of no avail to any party who claims to be an agriculturist merely on the basis of a contention that the site in his occupation is a Kudiyiruppu. An agriculturist can claim that the site of the dwelling house or hut in his occupation is Kudiyiruppu only if he is a tenant or a licensee in respect of the site alone.

7 Section 3, sub-section (2) of the Act lays down that,

> "(2) Where in the case of an occupant of Kudiyiruppu referred to in sub-section (1) the superstructure belongs to any person other than such occupant, such superstructure shall also, with effect from the date of the commencement of this act, vest in such occupant absolutely free from all encumbrances".

The question to be considered is whether sub-section (2) of section 3 will avail the defendant in the instant case Sub-section (2) of section 3 will be applicable only if the defendant proves that he is an occupant of a Kudiyiruppu and as Kudiyiruppu means the site of any dwelling house or hut occupied by him, either as a tenant or as a licensee he should have taken the site alone on lease, if he is to claim the benefits of the Act. Any other interpretation of the definition of "Kudiyiruppu' in sub-section (8) of section 2 of the Act will have far reaching and calamitous consequences because every agriculturist who is in occupation of a house as a tenant within the area to which the Act applies can then claim the benefits of the Act, not only in respect of the site but also of the house.

8. The defendant has not contended in his written statement that either he or any member of his family is cultivating an agricultural land by the contribution of his own manual labour. He has merely contended that he is an agriculturist entitled to the benefits of the Act, Improving upon his case in the written statement he has endeavoured to make out that one of his sons, whose name he has not disclosed in the course of his oral evidence, has been attending to agricultural operations on his land. The best evidence to prove that his son has been contributing his own manual labour for the cultivation of an agricultural land would be the evidence of the son himself.

If the son had been examined as a witness to swear that he has been contributing his own manual labour to cultivate an agricultural land, it would have been open to the plaintiff to cross-examine him and prove that he could not have carried on any such cultivation. In the absence of the evidence of the son of the defendant, the evidence of the defendant, who has examined himself as D. W. 1 to swear that one of his sons is cultivating his land, cannot be relied on. The version put forward by D W. 1, as noted already is an improvement upon the averments in the written statement.

9. The defendant has not produced any extract from the Adangal register to prove that he has been cultivating any land, or his son, by contributing his labour, has been cultivating any land. No doubt, P W. I has stated in the course of his cross-examination that the sons of the defendant are attending to agricultural operations. According to D W. I himself one of his two sons is still a student. The statement of P. W. I that the sons of the defendant are attending to agricultural operations is, therefore a mis-statement of fact. He has not admitted that the other son is carrying on cultivation by the contribution of his own manual labour. Therefore, the finding of the learned Subordinate Judge that the defendant is an agriculturist within the meaning of the Act cannot be sustained.

10 Even assuming that the defendant is an agriculturist entitled to the benefits of the Act, he cannot claim the benefits of the Act,

because he has not applied to the Authorised Officer within a period of two months from the date on which the dispute arose for the settlement of the dispute under section 4 as contemplated in rule 3 of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Rules, 1972, framed in exercise of the powers conferred by section 27 of the Act. If he had made such an application, the plaintiff would be entitled to the amount determined by the Authorised Officer as compensation payable to him. The defendant cannot apply after the lapse of a period of two months from the date on which the dispute arose, unless the delay is condoned by the Authorised Officer. The defendant has not yet applied to the Authorised Officer for the settlement of the dispute under section 4 of the Act. He cannot have the best of both the worlds, *viz*., claim the benefits of the Act and also refuse to pay compensation by merely not applying under rule 3 to the Authorised Officer for the settlement of the dispute under section 4. In view of the discussion above, I find that the defendant is not an agriculturist, entitled to the benefits of the Act, and even if he is entitled to the benefits of the Act, he cannot claim the benefits now because he has not applied to the Authorised Officer within two months from the date on which the dispute arose, *viz*., 22nd July, 1954, when a notice was issued by the plaintiff to him determining his tenancy and calling upon him to vacate.

11. In the result the second appeal is allowed, the judgment and decree of the learned Subordinate Judge in A. S. No. 109 of 1975 are set aside, and the judgment and decree of the learned District Munsif, Sirkali, in O. S. No. 741 of 1974 are restored with costs throughout.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M. M. Ismail, CJ. and M. A. Sathar Sayeed, J.*

V. Subramaniam .... *Appellant**

v.

State Bank of India, Staff Co-operative Society Ltd. by the Secretary and another ... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2) and Bye-law 12 (h)—Employee of Co-operative Society suspended—As per bye-law discretion exercised not to grant subsistence allowence—Claim for subsistence allowance dismissed by Labour Court—Petition under Article 226, Constitution of India against the order of Labour Court—Petition dismissed—Writ Appeal—Discretion held properly exercised.

The appellant was an employee of the respondent-Co-operative Society The appellant was placed under suspension and as per bye-law 12 (*h*), the discretion was exercised not to grant subsistence allowance. The appellant filed a petition under section 33-C (2) of the Industrial Disputes Act before the Labour Court claiming subsistence allowance. This was dismissed on the ground that the discretion had been properly exercised. Against the order of the Labour Court, the appellant filed a writ petition under Article 226 of the Constitution. The writ petition was dissmissed, On appeal therefrom,

Held: It is clear from the decision of the Full Bench in *The Secretary, Palani Co-operative Sales Society, Palani* v. *Presiding Officer, Labour Court, Madurai*, A. I. R. 1978 Madras 241 (F. B.), that the power of suspension under bye-law 12 (*h*) includes the power to suspend pending disciplinary proceedings, that the authority competent to

*W. A. No. 494 of 1980. *24th September,* 1980.

u spend has a discretion either to award u bsistence allowance or not to award subsistence allowance and that such a discretion has to be exercised reasonably and according to law and justice and not whimsically or arbitrarily In this particular case, even at the time when the order of suspension was passed, the discretion was exercised not to grant subsistence allowance. The seriousness of the charge levelled against a person like the appellant herein can certainly be a ground for declining to grant subsistence allowance.

It is not correct that the discretion part of the provision related only to the quantum and not for the total rejection of the subsistence allowance itself. [*Paras.* 4 *and* 5.]

Cases referred to:—

The Secretary, Palani Co-operative Sales Society, Palani v. *Presiding Officer, Labour Court, Madurai,* (1975) 88 L. W. 191 : A. I. R. 1975 Mad. 241 (F. B.) ; *Tirunelveli Dist. Co-operative Supply and Marketing Society Ltd., Tuticorin* v. *Labour Court, Madurai,* (1976) 1 L. L. J. 456.

Appeal under Clause 15 of the Letter Patent against the Order of Mr. Justice Mohan dated 30th July, 1980 and made in the exercise of the Special Original Jurisdiction ot the High Court in Writ Petition No. 1869 of 1979 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records and connected papers with the order dated 23rd November, 1978 made in C. P. No. 482 of 1978 on the file of the II Additional Labour Court, Madras and quash the same.

K. V. Anantha Krishnan, for Appellant.

The Judgment of the Court was delivered by

Ismail, CJ.— This is an appeal against the order of Mohan, J., dated 30th July, 1980 dismissing W. P. No. 1869 of 1979, filed by the appellant herein. The appellant was an employee of the respondent co-operative society. He filed before the Labour Court a petition under section 33-C (2) of the Industrial Disputes Act claiming subsistence allowance for the period of his suspension from 23rd December, 1977 to the end of July, 1978. The Labour Court dismissed the petition holding that under bye-law 12 (*h*) the respondent had a discretion to grant or not to grant subsistence allowance, that that discretion had been properly exercised in the present case not to grant subsistence allowance and that therefore the appellant herein would not be entitled to subsistence allowance. That order of the Labour Court was brought up before this Court in the writ petition referred to above. The learned Judge agreed with the conclusion of the Labour Court and dismissed the writ petition. Hence the present appeal has been filed by the appellant.

2. The scope of the bye-law couched in identical language came up for consideration before a Full Bench of this Court in *The Secretary, Palani Co-operative Sales Society, Palani* v. *Presiding Officer, Labour Court, Madurai*[1]. The said bye-law read as follows :

> "12 (*h*). The authority competent to suspend as employee may, in its discretion sanction him subsistence allowance at a rate not exceeding one-fourth of his substantive pay during the period of his suspension. No employee shall in any case be kept under suspension for a period exceeding three months at a time".

3. Dealing with this by-law the Full Bench observed as follows :

> "Generally stating, where the power of appointment is vested in an authority, it has the power of disciplinary action as well, which again necessarily involves the power to keep a particular member of the establishment under suspension in a suitable case pending an enquiry. No conferment of a separate power to that effect is necessary. Apart from the power of

1. (1975) 88 L. W. 191 : A. I. R. 1975 Mad. 241 (F. B.).

appointment, the power can be implied in the disciplinary power to inflict punishment by way of removal or dismissal or any other punishment. In the instant case sub-clause (*h*) extracted above visualises the power of suspension. In our opinion, it is not confined to suspension by way of punishment. It is also applicable to a case of suspension pending an enquiry. Discretion is given in the case of such suspension to allow subsistence allowance at a rate of one-fourth of the substantive pay during the period of suspension. If no order of sanction has been made, it may appear that during the period of suspension no remuneration will be permissible. But this discretion coupled as it is with a benefit has to be exercised in every case reasonably and according to law and justice and not whimsically or arbitrarily. It is only for stated reasons that the authority suspending a member pending an enquiry can deny subsistence allowance to him. We construe the provision in that way, more especially because of the last sentence in the sub-clause which has restricted the power of suspension to a period not exceeding three months at a time."

4. Thus it is clear from the decision of the Full Bench that the power of suspension under bye-law 12 (*h*) includes the power to suspend pending disciplinary proceedings, that the authority competent to suspend has a discretion either to award subsistence allowance or not to award subsistence allowance and that such a discretion has to be exercised reasonably and according to law and justice and not whimsically or arbitrarily. In this particular case, even at the time when the order of suspension was pass d, the discretion was exercised not to grant subsistence allowance. The order read s as follows:

"Pending further proceedings into your abovesaid conduct you are hereby suspended from service with immediate effect. As the charges levelled against you are serious in nature, it is not considered expedient to exercise the discretion for grant of any subistence allowance during the period of suspension."

5. Thus it is clear that the authority competent to suspend the appellant herein had applied its mind to the question of sanction of subsistence allowance, and came to the conclusion that it was not expedient to sanction subsistence allowance, having regard to the seriousness of the charges levelled against the appellant herein. The seriousness of the charge levelled against a person like the appellant herein can certainly be a ground for declining to grant subsistence allowance. Consequently the judgment of the Full Bench fully supports the conclusion of the Labour Court as well as the learned Judge.

6. However, the learned counsel for the appellant brought to our notice a decision of V. Ramaswami, J. in *Tirunelveli District Co-operative Supply and Marketing Society Ltd., Tuticorin* v. *Labour Court, Madurai*[1], which has also been referred to by Mohan, J. The learned Judge in that case was considering a bye-law similar to the one with which we are concerned in the present case. The bye-law in that case was bye-law 13 (1) (*c*), which read as follows:—

"Notwithstanding anything contained in the special bye-laws, the President shall be competent to place any member of the establishment under suspension from service, pending enquiry into a grave charge where such suspension is necessary in the interests of the Society. He may, at his discretion, sanction to the employee suspended a subsistence allowance at a rate not exceeding 1/4th of the substantive pay during the period of his suspension. No employee shall in any case be kept under suspension for a period exceeding three months at a time".

7. Though there may be some verbal difference in some respects between the bye-law which we are considering in the present case and the bye-law considered by the learned Judge in the decision referred to above, there is not any verbal difference as far as the provision regarding psyment of

1. (1976) 1 L. L. J. 456.

subsistence allowance is concerned. Dealing with the bye-law, the learned Judge observed :

"The first part of this bye-law deals with the power of the competent authority to place a member of the establishment under suspension from service pending an enquiry into grave charge, and the later portion deals with the direction given to the competent authority to pay a subsistence allowance at the rate not exceeding one-fourth of the substantive pay of the employee, during the period of his suspension. I think the learned counsel for the petitioner is well-founded in his contention that these two parts of the provision will have to be read independently and as providing separate and independent powers. This is more so for the reason that the Supreme Court and this Court in a number of cases have held that a competent authority has an inherent power to suspend an employee pending an enquiry into charges of misconduct. If that is is so, the discretion to pay subsistence allowance during the period of suspension will have to be read as an independent power or obligation to pay. Though this power is given as a discretion, the discretion part of it relates only to the quantum and not for a total rejection of the subsistence allow nce itself. Even such discretion, I have no doubt, will have to be exercised in a reasonable manner and not arbitrarily or capriciously".

8. We are of the opinion that the above observation of the learned Judge, that the discretion part of the provision related only to the quantum and not for the total rejection of the subsistence allowance itself, is opposed to the view of the Full Bench to which we have drawn attention. It is significant to note that the decision of the Full Bench was not brought to the notice of the learned Judge. and therefore in the judgment of the learned Judge no reference has been made to the decision of the Full Bench. However, having regard to the decision of the Full Bench, the view of V. Ramaswami, J., in this behalf cannot be said to be good law.

9. Under these circumstances, there is no ground to interfere with the order of Mohan, J The writ appeal therefore fails and is accordingly dismissed.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*G, Ramunujam, J.*

Marudhavana Desigar ... *Appellant**

v.

Thangamani Ammal ... *Respondent.*

Tamil Nadu Agriculturists' Relief Act (IV of 1938) as amended by Act (VIII of 1973), section 19—Decree-debt—Application for scaling down—Claim by debtor of being an agriculturist—Proof of debtor being agriculturist on the date of incurring of the debt and also on the date of application required.

Held: In this case, the sixth defendant (respondent) who had purchased the equity of redemption in some of the items of the mortgaged property and applied for the scaling down of the mortgage-decree-debt had produced evidence only to show that she was an agriculturist at the time of the filing of the application for scaling down. The sixth defendant was not a debtor on the date of the original debt, as she became the owner of the equity of redemption only subsequent to the mortgage decree. The material question therefore, was whether the mortgage debt was a debt by an agriculturist on the date of the mortgage. No question was raised in the Court below nor any evidence adduced as to whether the original mortgagor was an agriculturist on the date of the mortgage or whether defendants 1 to 5, who were the legal representatives of the original mortgagor were agriculturists. They had not claimed that the original mortgagor was an agriculturist, nor had they adduced any evidence to show that they were agriculturists. Therefore, even if it was taken that

*A. A. O. No. 372 of 1977. 21*st November*, 1980.

the respondent has established that she was an agriculturist on the date of her application, on the basis of the documents adduced, it is not possible to hold that the debt was payable by an agriculturist on the date of the mortgage. It may be that the mortgaged properties were agricultural land but it was not known whether the mortgagor did possess other estates which might bring him within the purview of any of the provisos attached to that definition of "agriculturist". In these circumstances the respondent must be deemed to have failed to show that the original debt was payable by an agriculturist and that the original debtor was an agriculturist on the date of the debt.

[*Para.* 6]

Cases referred to:—

Govindammal v. *Saradambal*, (1976) 89 L. W. 181 ; *Papathi Ammal* v. *Nallu Pillai*, (1963) 2 M. L. J. 594 : 77 L. W. 14 : I. L. R. (1964) 1 Mad. 536: A. I. R. 1964 Mad. 173 ; *Tulasi Ammal* v. *Thasu R. Sami Iyer*, I. L. R. (1976) 1 Mad. 234 : 90 L. W. 413, ; *Ramanathan Chettiar* v. *Ramaswami*, (1979) 92 L. W. 762; *Nageswarasami* v. *Viswasundara*, 1953 S. C. J. 539 : (1953) 2 M. L. J. 252 : 1953 S. C. R. 894: A. I. R. 1953 S. C. 370.

Appeal against the order of the Court of the Subordinate Judge, Thanjavur dated 19th October, 1976 and made in I. A. No. 889 of 1974 in O. S. No. 34 of 1971.

B. Rajagopalan, for Appellant.

K. Sarvabhauman, for Respondent.

The Court made the following

ORDER.—This appeal is directed against a laconic and non-speaking order passed by the lower Court directing the scaling down of a mortgage debt.

2. The appellant herein obtained a mortgage decree for a sum of Rs. 40,416.66 in O. S. No. 34 of 1971 on the file of the Sub-Court, Thanjavur on the basis of a mortgage bond, dated 12th February, 1961 against defendants 1 to 5, the legal representatives of the original mortgagor, the 6th defendant, who claims to have purchased the equity of redemption in respect of item 1 and a shop in item 2 of the suit properties. After the passing of the decree, the 6th defendant alone filed an application on 12th September, 1974, under section 19 of Act VI of 1938 as amended by Act VII of 1973, for scaling down the decree debt on the ground that she is an agriculturist. Her claim that she is agriculturist was disputed by the decree-holder, the appellant herein. According to the appellant, the 6th defendant was not an agriculturist at any time, much less on the date of the original mortgage debt.

3. In support of her claim that she is an agriculturist, the 6th defendant produced Exhibits A. 1, A. 3 and A-4. Exhibit A-1 is a kist receipt for fasli 1385 corresponding to the year 1975. Exhibit A-3 is a sale deed of the year 1970 and Exhibit A-4 is the patta issued in respect of the property purchased under Exhibit A-3. Thus all the documents produced by the 6th defendant to prove that she is an agriculturist relate to the period subsequent to 1970. Based on these documents, the Court, below held that as on the date of the application for scaling down under section 19, the 6th defendant was an agriculturist and therefore she is entitled to the benefits of Act IV of 1938 as amended by Act VIII of 1973 in view of the decision of N. S. Ramaswami, J. in *Govindammal and another* v. *Saradambal and others*[1]. The said order of the Court below has been challenged in this appeal by the appellant mortgage-decree-holder.

4. According to the learned counsel for the appellant, before a debtor could claim the benefits of Act IV of 1938 as amended by Act VIII of 1973, he should establish that he was

1. (1976) 89 L. W. 181.

an agriculturist on three relevant dates, namely (1) on the date of the debt; (2) on the date of the suit for recovery of the debt and (3) on the date of the application for scaling down that debt under section 19 and the decision in *Govindammal and another* v. *Saradambal and others*[1] does not in fact support the view taken by the Court below and it is in error in holding that the 6th defendant is entitled to the benefits of the said Act on the basis of the said decision. The learned counsel for the appellant submits that the said decision of N. S Ramaswami, J. in *Govindammal* v. *Saradambal*[1] which has been followed by the Court below cannot be understood as laying down that it is sufficient for a debtor to be an agriculturist on the date of the application to claim the benefits of the Act and that in that case the learned Judge held that as the applicant for scaling down had not been shown to be an agriculturist on the date of the application, she cannot maintain that application, On a perusal of the said judgment, it is seen that the learned Judge after referring to the decision of the Full Bench reported in *Papathi Ammal* (alias) *Nallamal* v. *Nallu Pillai*[2] held that an applicant for scaling down under section 19 seeking the benefit of the amending Act VIII of 1973 has to prove that he was an agriculturist on the date of the application 'as well'. The significance of the words 'as well' used by N. S. Ramaswami, J in his judgment has been overlooked by the Court below. The Court below has proceeded that if the applicant for scaling down shows that he or she was an agriculturist on the date of the application, that is sufficient to entitle him or her to claim the benefits of the Act This view of the Court-below cannot at all be sustained in the face of the decision of the Full Bench referred to above. It has been laid down by the Full Bench that in order to entitle a debtor to claim relief under section 13 of the Madras Agriculturists Relief Act IV of 1938, he must be an agriculturist as defined in the Act on two crucial dates (1) on the date of the loan as otherwise it would not be a debt incurred by an agriculturist, and (*ii*) on the date of recovery thereof through the process of Court, as otherwise there would be no proceeding for recovery of debt as defined by the Act. N. S. Ramaswami, J has held that in addition to showing that the debtor was an agriculturist on the crucial dates referred to above as held by the Full Bench, he must also be an agriculturist on the date of the application as well. Thus the decision of N S. Ramaswami, J. clearly proceeds on the basis that a debtor before he claims the benefits of Act IV of 1938 as amended by Act VIII of 1973, must show that he is an agriculturist on three dates, the date of the debt, the date when the debt is sought to be recovered and the date when the application is made by the debtor for scaling down. The view taken by the Full Bench has been followed and applied by Natarajan, J, in *Tulasi Ammal others* v. *Thasu R. Sami Iyer*[1], and by Padmanabhan, J. in *RM. AR AR. RM. AR. Ramanathan Chettiar* v *VC. RM K. Ramaswami Chettiar*.[2] In this context, it is prudent to note the following observations of Ramachandra Iyer, C J. speaking for the majority, in the Full Bench decision referred to above :

> "In order to entitle a debtor to claim relief under section 13, he must be an agriculturist as defined in the Act on two crucial dates (1) on the date of debt (as otherwise it will not be a debt incurred by an agriculturist) and (2) on the date of recovery thereof through the process of Court (as otherwise there would be no proceedings for recovery of a debt as defined by this Act)".

5. Natarajan, J. applying the Full Bench decision to a case arising under sections 7 and 8 of the Amending Act VIII of 1973 observed :

> "I am not persuaded to accept the argument of the appellant's counsel and hold

1. (1976) 89 L. W. 181.
2. I. L. R. (1964) 1 Mad. 536 : (1963) 2 M. L. J. 394; 77 L. W. 14 : A. I R. 1964 Mad. 173.

1. I. L. R. (1976) 1 Mad. 254 ; (1977) 90 L. W. 413.
2. (1979) 92 L. W. 762.

that the conditions laid down in *P 'pathi Ammal* v. *Nallu Pillai*[1] for a person to invoke the benefits of the Act would not apply to the facts of the case on hand If the contention of the appellants is to be accepted then it would lead to ludicrous results. Even a non-agriculturist can, subsequent to incurring the debt, acquire interest in a small piece of agricultura land and then claim the benefits of exemption undes the Act. Surely, the intention of the legislature was not to confer the benefits of the Act on such a class of persons. The Act was intended to apply only to genuine agriculturists who had an interest in agricultural lands at the time of incurring the liability and continued to be an agriculturist all through till proceedings were instituted for recovery of the debt ....

....

From the wording it can be clearly seen that the date of incurring of the debt would be the crucial date for determining whether a pesson was an agriculturist or not. It is with reference to this date, the Court will have to find out whether a person had been assessed to income-tax or profession tax or house tax etc., and decide whether the debtor is an agriculturist or not. The obvious inference, therefore, is that the intention of the legislature was to confer the benefits of the Act only on persons who were agriculturists, except those referred to in the proviso, on he date the debt was incurred. In that view of the matter also, the contention of the appellant must be held to be an untenable one".

Thus Natarajan, J. in *Thulasi Ammal and others* v. *Thasu R. Sami Iyer*[2], clearly lays emphasis on the necessity of the debtor being as agriculturist on the date of the debt. Padmanabhan, J. who followed the decision of the Full Bench as well as the decision of Natarajan, J referred to above held that it is necessary for a person who claims the benefit of the Act to show that he was an agriculturist on the date of the debt and on the recovery thereof through process of Court.

6. Admittedly, in this case, the respondent, who had purchased the equity of redemption in some of the items, had produced evidence only to show that she was an agriculturist at the time of the filing of this application. It is true, the 6th defendant was not a debtor on the date of the original debt, as she became the owner of the equity of redemption only later. As pointed out by the Supreme Court in *Nageswarasami* v. *Viswasundara*[1].

> "The liability of a purchaser of the equity of redemption to pay the mortgage debt undoubtedly arises on the of date his purchase; but the debt itself which has its origin in the mortgage bond did exist from before his purchase, and if it was payable by as agriculturist at the relevant date, the purchaser could ,certainly claim the privileges of the Act if he him self was an agriculturist at the date of his application."

The material question, therefore, is whether the mortgage debt was a debt due by an agriculturist on the date of the mortgage. The respondent contends that as the said mortgage debt was in relation to agricultural lands the original debtors were certainly agriculturists on the date when they borrowed the amount on mortgage I do not think there is any warrant for any such assumption on the materials on record. The only question urged before the Court below was that the respondent was an agriculturist on the date of her application. These was no question raised nor any evidence adduced as to whether the original mortgagor was an agriculturist on the date of mortgage or whether defendants 1 to 5 who are the legal representatives of the original mortgagor were agriculturists. As a matter fact defendants 1 to 5, the legal representative of the

1. (1963) 2 M. L. J. 394: A I. R 1964 Mad. 173.
2. I. L. R. (1976) 1 Mad. 254: 90 L. W. 413,

1. 1953 S. C. J. 539: (1953) 2 M L. J 252: 1953 953 S. C. R. 894 A. I. R. 1953 S. C. 370

original mortgagor were agriculturists As a matter of a fact defendants 1 to 5, the legal representatives of the original mortgagor have not claimed that the original mortgagor was an agriculturist, nor have they adduced any evidence to show that they are agriculturists. Therefore, even if it is taken that the respondent has established that she was an agriculturist on the date of her application, on the basis of the documents adduced, it is not possible to hold that the debt was payable by an agriculturist on the date of the mortgage debt. It may be that the mortgaged properties were agricultural lands but it is not known whether the mortgagor did possess other estates which might bring him within the purview of any of the provisos attached to the definition of "agriculturist". In these circumstances, the respondent must be deemed to have failed to show that the original debt was payable by an agriculturist and that the original debtor was an agriculturist on the date of the debt, that is on 12th February, 1961.

7. In this view of the matter, the appeal is allowed and the order of the lower Court is set aside and the application for scaling down filed by the respondent will stand dismissed. There will be no order as to costs.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

K. Venkataramani ... *Petitioner**

v.

S. Aravamuthan and others.... ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (2) (i) *and 10* (3) (*a*) (i)—*Petition for eviction by landlord—Allegation of tenant committing wilful default and* bona fide *requirement of landlord—Rent Controller ordering eviction on both grounds—Appeal to Appellate Authority by tenant—Finding on wilful default confirmed—* Bona fide *requirement negatived—Appeal dismissed—Revision by tenant to High Court — Question of* bona fide *requirement whether can be agitated by landlord—"Person aggrieved"—Meaning.*

Held, that the respondents (landlords) were persons affected by the findings of the Appellate Authority on the question of *bona fide* requirement, although the ultimate decision was in their favour. Having secured an order in their favour, it is not open to the respondents, to prefer an appeal against the decision of the Appellate Authority on this point alone as the ultimate order is in their favour. A landlord who urges before the Authorities below several grounds to secure an order for eviction against the tenant and succeeds in establishing one of such grounds and fails in others and secures ultimately an order in his favour, is nevertheless a person "aggrieved" with reference to those findings against him, if the ultimate decision of the Authorities is challenged by the opposite party. In addition the functionaries under the Act are

*C. M. P. No. 2515 of 1980. *2nd December,* 1980.

within their jurisdiction to enquire into application for eviction, fixation of fair rent, *etc.*, and though the entire procedure applicable to civil Courts cannot be applied to those Authorities yet rules of justice, equity and good conscience could be invoked to relieve difficulties and avoid situations like the present. In the present case the respondents were not able to persuade the Appellate Authority on the question of *bona fide* requirement which they urged successfully before the Rent Controller. The respondents by the order of the Rent Controller, secured an order for eviction on two grounds and by the order of the Appellate Authority, one of those grounds was taken away, though the ultimate order was in their favour. It may even be stated that the respondents have been relieved of the right to an order of eviction on the ground of *bona fiide*, requirement by the Appellate Authority. The respondents would therefore be persons 'aggrieved' in so far as the finding on this aspect went against them before the Appellate Authority Under these circumstances it is open to the respondents to sustain the order of eviction on that ground as well.

[*Para.* 14.]

Cases referred to :—

Seetaram v. *Ramabai*, A. I. R. 1958 M. P. 221 ; *Reed Rowen Co.*, In re, (1977) 19 Q. B. D. 174.

Petition under section 25 of the Tamil Nadu Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge, Kumbakonam dated 31st July, 1980, and made in C. M. A. No. 43 of 1979 (R. C. C. P. No. 7 of 1979 on the file of the Rent Controller, Kumbakonam).

R. G. Rajan, for Appellant,

K. R. Ramabhadran, for Respondent.

The Court delivered the following

JUDGMENT.—The tenant is the petitioner. The respondents-landlords filed a petition in R. C. O. P. No. 7 of 1979 for an order of eviction against the petitioner under sections 10 (2) (*i*) and 10 (3) (*a*) (*i*) of the Tamil Nadu Building Lease and Rent Control) Act, XVIII of 1960 as amended by Act XXIII of 1973 (hereinafter referred to as the Act). According to the case of the respondents, the property in the occupation of the petitioner belonged to the joint family of respondents 1 to 3, their father and their brother one deceased Gopalan. In 1963, the father renounced the world and became an ascetic and also released his share in the property in favour of his sons, the respondents 1 to 3 herein and Gopalan. Gopalan, the brother of respondents 1 to 3 herein and the husband of the 4th respondent and the father of respondents 5 and 6, died subsequently and the respondents became the owners of the property in question. The petitioner, according to the case of the respondents, became a tenant in respect of the property through one Venkatanathan On an earlier occasion an application for eviction in R C. O. P No. 14 of 1971 was filed by the first respondent herein against the said Venkatanathan, since deceased and the petitioner on the ground of wilful default and that the petitioner is a sublessee under Venkatanathan and the application for eviction was allowed by the Rent Controller and the order was affirmed in appeal. But in C R P. No 2418 of 1973, it was held that the petitioner was a direct tenant of the first respondent and others. The respondents stated that the mother of respondents 1 to 3 is an old, pious, religious and orthodex lady and is anxious to spend the evening of her life at Kumbakonam with a view to take dips in the holy Cauvery and have worship of the deity in the temple in order to secure salvation for her soul. It was also the further case of the respondents that the third respondent had been insane for some years and that the doctors had advised that his recovery would be faster if their is a change of climate and environment and, therefore, the respondents *bona fide* needed the premises in the occupation of the petitioner for those purposes. The respondent further stated that in spite of the adjudication in C. R P. No. 2418 of 1973, the petitioner did not pay any rent from October, 1973 till the end of 1978, though

the tenancy commenced from May, 1970 onwards and the default in the payment of rents committed by the petitioner was characterised as wilful default. The respondents also stated that as regards the advance of Rs, 2,000 which was directed by the order in C. R. P. No. 2413 of 1973 to be adjusted against the rents payable by the petitioner, it could not be so done because the petitioner instituted a suit in O. S. No. 238 of 1973, District Munsif's Court, Kumbakonam, against Venkatanathan and the first respondent herein and also obtained a decree against the said Venkatanathan. Alleging that in spite of several notices, the petitioner had not paid the rents and that such non-payment was wilful; the respondents filed the application for eviction as aforesaid under sections 10 (2) (*i*) and 10 (3) (*a*) (*i*) of the Act.

2. The petitioner, while accepting the status of the first respondent as landlord, disputed that of the respondents 2 to 6 According to the case of the petitioner, Venkatanathan, an agent of the first respondent required a sum of Rs 2,000 to be given as advance to be adjusted towards the future rents for the purpose of carrying out repairs to the building and that when the building was so let out in 1970 the petitioner paid a sum of Rs. 2.000. But Venkatanathan did not effect any repairs, nor did he provide water tap connection as promised. In addition, the petitioner also claimed that municipal taxes repair charges, water tap connection charges, additional electric deposits, etc , have all been paid by him and these amounts as well as the amount of Rs 2,000 have to be adjusted as against the rents payable by the petitioner. Referring to the proceedings initiated on the former occasion in R C. O P No. 14 of 1971 by the first respondent herein, the petitioner stated that it was only on account of the stand taken by the first respondent regarding the advance amount of Rs. 2,000 that the petitioner was obliged to institute the suit in O. S. No. 238 of 1973 and obtained a decree against Venkatanathan and claimed that the costs in that suit has also to be adjusted towards the rent The petitioner appended the details of the amounts paid and expense incurred by him and according to this statement, the rent payable by the petitioner for the period in question would be Rs. 10,600 while the amounts expended by him in respect of the house, in the payment of property taxes, under tap connection charges, repair charges, additional electricity deposit, etc., totalled upto Rs. 10,928 46. In other words, the petitioner pleaded that there was an excess amount in a sum of Rs. 328-46 p. to his credit which had to be adjusted towards the rent for future months The petitioner, therefore, contended that there was no question of any default much less wilful default in the payment of rents as claimed by the respondents. The requirement by the respondents of the premises in question for the purpose of the mother of the respondents 1 to 3 as well as for accommodating the third respondent was stated to be not *bona fide*. An objection that the petition for eviction is also bad for misjoinder of respondents 2 to 6 who are not landlords was also taken. On these grounds, the petitioner prayed for the dismissal of the application for eviction filed by the respondents.

3. The learned Rent Controller (District Munsif), Kumbakonam, on a consideration of the oral as well as the documentary evidence, held that the application filed by the respondents is maintainable and that the claim of adjustment made by the petitioner in respect of all the amounts detailed in the counter cannot be allowed and that even deducting such adjustable and allowable amounts as have been claimed by the petitioner, the petitioner owes considerable amounts to the respondents and that there was no justification whatever for the non-payment of the rents ever since the date of inception of the tenancy and that such non-payment of the rents, in the circumstances of the case would be nothing but wilful On the question whether the respondents have established that they *bona fide* require the premises in the occupation of the petitioner, the Rent Controller took into account the circumstances of the cases and on the evidence concluded that the respondents have established

that they *bona fide* require the building for accommodating their mother. On these conclusions, an order for eviction was passed against the petitioner. Aggrieved by this, the petitioner preferred an appeal in C. M A. No. 43 of 1979 to the Appellate Authority (Sub-Court), Kumbakonam. The Appellate Authority, on a consideration of the stand taken by the petitioner in the reply notice issued by the petitioner as well as in the course of the proceedings in R. C. O. P. No. 14 of 1971, said that the application for eviction at the instance of the respondents was maintainable, as the petitioner had admitted that the respondents would be the landlords in respect of the property in his occupation. On the question of wilful default, the Appellate Authority held that certain amounts claimed by the petitioner by way of adjustment could not be so adjusted as the expenditure was incurred by the petitioner without the consent of the respondents and that even after adjusting some of the payments made by the petitioner, the petitioner had not satisfactorily explained the non-payment of the rents for several years after the commencement of the tenancy and in that view held that the petitioner had committed wilful default in the payment of rents. As regards the *bona fide* requirement of respondents, the Appellate Authority concluded that it had not been established that the third respondent is an insane person and that for the purpose of accommodating him and also for the purpose of enabling the mother of respondents Nos 1 to 3 to spend the evening of her life at Kumbakonam, the premises is required *bona fide*. In view of the conclusions arrived at on the question of wilful default, the order for eviction passed by the Rent Controller was upheld and the appeal was dismissed.

4. The question of the maintainability of the application for eviction by the respondent herein has been found in their favour by the authorities below. Indeed, the learned counsel for the petitioner did not in any manner challenge this finding of the authorities below. Even otherwise, it is found from the terms of the release deed Exhibit A-1, dated 28th January, 1963 that the father of respondents 1 to 3 Srinivasaraghavachariar had become an ascetic and had released his share in the property in favour of his sons, namely, respondents 1 to 3 herein and deceased Gopalan and, therefore, all the four sons became entitled to the property and after the death of Gopalan, the respondents 4 to 6 are also entitled to the share of the deceased Gopalan. It is thus obvious that the respondents are the persons who are entitled to the property and also entitled to receive rents therefrom and would undoubtedly be landlords in relation to the building in the occupation of the petitioner. Exhibit A-4 is the certified copy of the reply notice dated 5th January, 1971, sent by the petitioner's advocate in R. C. O. P. No. 4 of 1971 and Exhibit A-5 is the counter filed by the petitioner in those proceedings. Under Exhibits A-4 and A-5, the petitioner has specifically taken up the position that the first respondent herein alone is not the owner of the premises and that it belongs to his other brothers as well. As a matter of fact, under Exhibit A-5, the petitioner has stated that the application filed by the first respondent in R C. O. P. No. 14 of 1971 is bad for the non-joinder of the other brothers. In the course of the deposition of the petitioner who has been examined as R W-1 the petitioner has admitted the correctness of what has been stated under Exhibits A-4 and A 5 Under these circumstances, the objection raised by the petitioner that the application for eviction filed by the respondents is not maintainable cannot be sustained. The finding of the authorities below that the petitioner had accepted in the prior proceedings that all the brothers of the first respondent would be landlords and, therefore, the respondents 1 to 3 and the legal representatives of the deceased brother Gopalan who are respondents 4 to 6 would be landlords entitled to maintain the application, is perfectly correct and does not suffer from any infirmity.

5. The question whether the petitioner committed wilful default in the payment of rents may be now considered. In the application for eviction, the respondents have

stated that the petitioner came into possession of the property in May, 1970 through one Venkatanathan and that the rents had remained unpaid from October, 1973 till the end of 1978. In answer to this, the petitioner claimed that he is entitled to adjust the rents payable by him as against the amounts expended by him and detailed in the counter filed by him. It is not in dispute that even since the inception of the tenancy, no amount had been paid by the petitioner towards rent to the respondents. It would be convenient to take up the items mentioned in the counter of the petitioner and to find out how far the petitioner is in order in claiming an adjustment with reference to those amounts.

6. The first item mentioned by the petitioner is a sum of Rs. 2,000 paid on 23rd April, 1970, by cheque as advance. It is found from the evidence that this cheque was cashed by one Venkatanathan who had been held to be the agent of the first respondent in Civil Revision Petition No 2418 of 1973. R. C. O P. No 14 of 1971 was filed by the first respondent herein against Venkatanathan and the petitioner on the ground of wilful default in the payment of rents and that Venkatanathan was the main tenant and the petitioner was a sub-lessee under him and therefore, an order for eviction should be passed. Though the Rent Controller as well as the Appellate Authority in C. M A. No. 25 of 1972 upheld the contention of the first respondent herein, in C. R. P No. 2418 of 1973 disposed of on 16th January, 1974, it was held that the petitioner was the tenant of the first respondent and that Venkatanathan merely functioned as the agent of the first respondent and that there was no default in the payment of rents. It was also further found that Venkatanathan had received the amount of Rs. 2,000 from the petitioner as advance to be adjusted in future rents. Though this was the final adjudication in the Civil Revision Petition, yet, even during its pendency, the petitioner instituted a suit in O. S No. 238 of 1973, District Munsif's Court, Kumbakonam, for the recovery of the sum of Rs. 2,000 against Venkatanathan and the first respondent herein. The suit was decreed against Venkatanathan and was dismissed against the first respondent. The plaint in that suit has been marked as Exhibit A-7 and in the judgment disposing of C. R. P. No. 2418 of 1973, this Court proceeded on the footing that the amount of Rs 2,000 received by Venkatanathan as advance would be available for adjustment. But the subsequent events, namely, the institution of O. S No 238 of 1973 District Munsif's Court, Kumbakonam and the obtaining of a decree for that amount against Venkatanathan rendered the adjustment impossible, with the result that it is not open to the petitioner to claim that the amount should be adjusted as against the rents payable by the petitioner in respect of his occupation of the premises belonging to the respondents herein. The evidence of the petitioner examined as R. W. 1 also indicates that the amount of Rs. 2,000 advanced to Venkatanathan is shown in the loan account and that it is not mentioned that it was in respect of advance towards the house. It is also the further evidence of R W No. 1 that he filed an application for executing the decree in O S. No 238 of 1973 and that he did not file any full satisfaction memo therein This evidence of R W No. 1 would clearly indicate that the sum of Rs. 2,000 had nothing whatever to do with the advance as such and that even if it was paid to Venkatanathan as such, the petitioner had obtained a decree against him and had also executed that decree and had not entered a full satisfaction, with the result that the decree is still outstanding Under those circumstances, the amount of Rs 2,000 cannot be treated to be advance as such received by the first respondent in respect of the property and, therefore, adjustable towards rent at the instance of the petitioner.

7. The next two items in respect of which the petitioner claims an adjustment are (1) interest on the said amount of Rs. 2,000 at 12 per cent per annum from 22nd April, 1970 to 31st January, 1974; and (2) interest from 1st February, 1974 to 31st January, 1979 at 6 per cent per annum, amounting to Rs. 900 and Rs. 610 respectively. The suit in O. S. No. 238 of 1973, District Munsif's Court,

Kumbakonam, as noticed already was dismissed against the first respondent and decreed only against Venkatanathan. The decree provided for the payment of interest at 6 per cent per annum on Rs. 2,000 from 1st March, 1972 till the date of payment only against Venkatanathan. Since the suit had been dismissed against the first respondent, no interest payable on the amount decreed can be adjusted against the first respondent herein towards the rents payable by the petitioner. In addition, the petitioner has also not succeeded in establishing that there was any agreement between him and the respondents that the petitioner is entitled to interest on the amounts decreed as against Venkatanathan and such interest is also adjustable as against the rents payable by the petitioner. Under these circumstances, the petitioner is not entitled to adjust the interest on the amount of advance of Rs. 2,000 namely, Rs. 900 and Rs. 610 towards rents payable by the petitioner.

8. The next item relates to the payment of municipal taxes in respect of the premises in the occupation of the petitioner from the second half year 1973-74 to the first half year 1978-79. No doubt, it will be the duty of the owner of the premises to pay the municipal taxes. But the petitioner has paid under Exhibit B-3 the tax due to the Municipality as an occupier, though the petitioner, in the course of his evidence would admit that no notice with reference to the payment of municipal taxes was sent to him in his capacity as an occupier and no distraint proceedings were also taken. Even though it does not appear that there was any agreement as such between the petitioner and the respondents with reference to the payment of municipal taxes, yet, since the primary liability for the payment thereof rests with the landlords-respondents and that liability had been discharged by the petitioner by payment amounting to Rs. 1,951.29, this payment must be given effect to and adjusted towards the rents payable by the petitioner.

9. The petitioner claims an adjustment of a sum of Rs. 162.17, with reference to charges paid for securing a water tap connection. The evidence of the petitioner in this regard is to the effect that he did not secure any permission to writing from anyone for installing the water tap connection. It is also his further evidence that in the agreement no mention whatever was made as regards the water tap connection. Though the petitioner would now claim that Venkatanathan agreed to provide water tap connection even at the time when the tenancy commenced, the petitioner would admit that he did not give any notice to Venkatanathan complaining that no such water tap connection had been provided. It is also not the case of the petitioner that there was any agreement that the expenses incurred by him in connection with the securing of water tap connection can be adjusted towards the rent for the premises. Under these circumstances, the incurring of the expenditure by the petitioner in a sum of Rs. 162.17 cannot be held to be an expenditure which would be binding on the respondents and adjustable as such against the rents payable by the petitioner.

10. The next item adjustment of which is claimed by the petitioner relates to costs incurred with reference to the institution of O. S. No. 238 of 1973, District Munsif's Court, Kumbakonam. Even here, the petitioner is not entitled to claim any adjustment as against the respondents since the petitioner has admitted that the suit O. S. No. 238 of 1973 was decreed against Venkatanathan with costs. If the petitioner had secured a decree for costs against Venkatanathan, even according to him, it is not permissible for the petitioner to claim adjustment of the costs awarded under the decree in O. S. No. 238 of 1973 against Venkatanathan against the rents payable by the petitioner to the respondents.

11. The next item in respect of which the petitioner claims an adjustment is a sum of

Rs. 655 stated to have been spent for repairs effected. In order to substantiate this, the petitioner relies upon Exhibits B-6, B-7 and B-8, the carbon copy of the bill book belonging to his shop. No doubt, these documents may establish the supply of some planks, but there is nothing therein to indicate that the respondents or even Venkatanathan ever authorised the petitioner to carry out any repairs in the premises in question. The evidence of P W. 1 is to the effect that the respondents had not authorised the petitioner to do any repairs. Equally, the evidence of the petitioner examined as R. W. 1 shows that no notice was ever given by him with reference to the need for repairs and that no proceedings were also initiated for the purpose of enabling the effecting of the repairs. If really repairs were needed to the premises in the occupation of the petitioner he should have issued a notice to the respondents asking them to carry out the necessary repairs or at least the petitioner should have secured the authorisation from the respondents to carry out the repairs and to adjust the expenses incurred therein towards the rents payable. But no such document or authorisation is forthcoming. In addition, the petitioner has not made any attempt whatever to examine any of those persons who were employed in the carrying out of the so-called repairs to the building. It has also not been established that the consent of the respondents was taken to incur the expenditure for repairs and to adjust the same against the rent. Further, before the tenant can carry out the repairs at his expense, the procedure under section 22 of the Act has to be followed by issuing a notice to the landlord to carry out the repairs within a reasonable time and if it is not so done, then the Controller should be moved, who thereafter, may direct the carrying out of such repairs by the tenant and the deduction of the cost thereof from the rent payable for the building. The proviso to section 22 of the Act also limits the incurring of such expenditure towards repairs to one-twelfth of the rent payable in respect of the building for a year. In the absence of a notice by the petitioner to the respondents calling upon them to carry out the repairs, it cannot be readily assumed that there was an omission on the part of the respondents to carry out the repairs which would justify the effecting of such repairs by the petitionerand deduction of the amount so expanded from out of the rents. Section 22 of the Act makes provision for such a case and even assuming that there was a refusal by the respondents, the petitioner cannot, without recourse to section 22 of the Act, proceed to carry out the repairs and mulct the landlords respondents with the expenses of such repairs and claim an adjustment of such amounts as well. The claim of adjustment of Rs. 655 by the petitioner under this head is, therefore not in order.

12. A sum of Rs. 45 towards additional electric deposit made is sought to be adjusted by the petitioner against the rents payable by him. The person in whose name the connection stands is the person who is also liable to pay the deposit. The amount, therefore, should have been paid by the respondents in the usual course. But instead it was paid by the petitioner. However, the respondents would claim that since the petitioner consumed more electricity, it became necessary to call for an additional deposit and, therefore, the respondents cannot be made to pay the excess deposit. The demand for additional deposit cannot be stated to be due to the higher consumption of electricity. The deposit would also ensure to the benefit of the respondents. The petitioners's claim of adjustment with reference to this amount is in order.

13. A sum of Rs. 4,350 is stated to have been deposited by the petitioner towards rent during the pendency of the eviction proceedings in R. C. O. P. No. 14 of 1971 and C. M. A. No. 25 of 1978. With reference to this claim, the Appellate Authority has pointed out, after verifying the concerned, register, that the petitioner has paid four sums of Rs. 1, 450 Rs. 400, Rs. 200 and Rs. 200, totalling to Rs. 2,250 only and not Rs. 4, 350 as claimed by the petitioner. The amount of Rs. 2,250 so deposited by the petitioner has necessarily to be given credit to and adjusted towards the rents payable by the petitioner. The claim of the petitioner to the extent of Rs, 2,250 as

against Rs. 4,350 made by him, would be in order. Thus, the petitioner is entitled only to claim an adjustment with reference to three items only and no more, namely, (1) Municipal taxes paid to the tune of Rs. 1, 951.29. (2) additional electricity deposit Rs. 45 and (3) rents deposited into Court Rs. 2, 250 totalling to Rs 4,246 29. Even according to the petitioner, the rents payable since the inception of the tenancy is Rs. 10,600, out of which the petitioner is entitled to claim an adjustment only as regards Rs. 4,246.29. There is no justification whatever for not paying the balance. It is necessary to point out that after the disposal of the Civil Revision Petition No. 2418 of 1973, the petitioner could have been expected to be regular in the payment of rents, but he did not do so. Indeed, the petitioner had admitted in the course of his evidence that the adjustment was thought of only when a reply to Exhibit A-11, dated 3rd December, 1978 was sent and not before. It is thus obvious that not having paid any rent whatever for a period of nearly 8 years since the inception of the tenancy, the petitioner entertained the idea of adjustment of the amounts only in 1978 and not before. This shows that the claim of the petitioner to adjust the rents is not *bona fide* at all and has been thought of only as a device to cover up the laches on the part of the petitioner in not having paid the rents for a very long period, while being fully aware of his obligation to pay the monthly rents to the respondents. The conclusion of the authorities below that the petitioner has committed wilful default in the payment of rents has been clearly established by the evidence on record and the conduct of the petitioner.

14. It is now necessary to notice the contention of Mr. S. Govind Swaminathan, the learned counsel for the respondents that the Appellate Authority was in error in holding that the respondents have not made out their *bona fide* requirement of the premises in the occupation of the petitioner for their own use. On this aspect, the contention of the learned counsel for the petitioner is that the two grounds on on which the respondents rested their application under section 10 (3) (*a*) (*i*) of the Act have not been made out and, therefore, the refusal by the Appellate Authority to gr nt an order for eviction is correct. A further point was also raised that it may not be open to the respondents who have succeeded in secured an order for eviction on one ground to challenge the correctness of the conclusion of the Appellate Authority on another ground on which such an order was refused. No doubt, the respondents are per one who have been affected by the finding of the Appellate Authority on the question of *bona fide* requirement, though the ultimate decision is in their favour. Having secured an order in their favour, it is not open to the respondents to prefer an appeal against the decision of the Appellate Authority on this point alone, as the ultimate order is in their favour. A landlord, who urges before the authorities below several grounds to secure an order for eviction against the tenant and succeeds in establishing one of such grounds and fails in the other and secures ultimately an order in his favour, is neverless a person aggrieved with reference to those findings against him, if the ultimate decision of the authorities below is challenged by the opposite party. In addition, the functionaries under the Act are authorities with jurisdiction to enquire in to applications for eviction, fixation of fair rent, etc, and though the entire gamut of the procedure applicable to civil courts below be applied to those authorities, yet, rules of justise, equity and good conscience should be invoked to relieve difficulties and assist situations like the present. In the instant case, the respondents were not able to persuade the Appellate Authority on the question of *bona fide* requirement which they urged successfully before the Rent Controller The respondents, by the order of the Rent Controller, secured an order for eviction on two grounds and by the order of the Appellate Authority, one of those grounds was taken away, though the ultimate order was in their favour. It may even be stated that the respondents have been relieved of the right to an order of eviction on the ground of *bona fide* requirement by the Appellate Authority. The respondents, would, therefore, be persons aggrieved in so

far as the finding on this aspect went against them before the Appellate Authority. Under those circumstances, is it not open to the respondents to sustain the order of eviction on the other ground as well? I am of the view that they can.

15. A decision reported in *Seetaram* v. *Ramabai*[1] supports this view. Hidayatullah, Chief Justice of that Court (as he then was) considered the question, who is a person aggrieved. Quoting with approval Lord Wacher in *Ex-parte Official Receiver in re Reed Rowen Co.*[2] the learned Judge observed that a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand. The learned Judge further observed as follows :

> "In our opinion, without having to decide whether Order 41, rule 22 of the Code of Civil Procedure applies or not to rent control proceedings and appeals arising therefrom, we are quite satisfied that on general principles, a party who has an order in its favour is entitled to show that the order is justified on some ground which was decided against it by the Court below."

16. Ramaprasada Rao, J. (as he then was) in *G. Jayalakshmi Ammal* v. *N. Pattabiramayya and others*[3] applied the aforesaid principles to a case where out of four grounds urged in support of an application for eviction, only one was found in favour of the landlady and the Appellate Authority in the appeal filed against the order of eviction declined to go into the contention that the land lady should be given an opportunity to urge the other three points as well before the Appellate Authority. No doubt, the revisional jurisdiction under section 25 of the Act is invoked by a person aggrieved by an order of the Appellate Authority. But the scope of the exercise of the revisional powers is not merely restricted to the particular ground on which the decision is rested but extends to the correctness, legality or propriety of any decision or order passed in the proceeding and this would include, in my view, the power to examine the correctness or otherwise of a finding adverse to the respondents. It would, therefore, be undoubtedly open to the respondents to canvass the correctness of the finding of the Appellate Authority on the question of *bona fide* requirement and claim that the order of eviction should be rested on that ground as well.

17. The two grounds upon which the respondents projected their case under section 10 (3) (*a*) (*i*) of the Act are that the mother of the respondents 1 to 3 is an orthodox lady and a believer in sastric pursuits and eager to spend the evening of her life desiring worship of the Lord everyday and that the third respondent who has been insane for some years has been advised a change of place and environment so that he can recover. The petitioner disputed this requirement. The Rent Controller upheld this claim of the respondents while the Appellate Authority rejected the case. The evidence discloses that the mother of the respondents 1 to 3 is an orthodox, pious and religious lady. Being the wife of a person who has renounced the world, there is nothing unnatural in this bent of mind of the mother of respondents 1 to 3 and her desire to spend the rest of her lifetime in Kumbakonam giving her an opportunity to take dips in the holy Cauvery and to worship her Istha Devata. The evidence of P. W. 1 would disclose that the mother is aged about 60 years and that she is capable of doing work and looking after herself. The Appellate Authority would appear to discountenance this claim of the respondents on the ground that it is improbable that an old lady should leave her sons at Madras and settle down with an insane son at Kumbakonam, without any male help. That would only be a general statement inapplicable to the facts of the present case as disclosed by the evidence. As stated already, the fact that the father of the respondents 1 to 3 had become a *sanyasi* must have influenced the mind of the mother

1. A. I. R. 1958 M. P 221.
2. (1977) 19 Q. B. D. 174.
3. C. M P. No. 2597 of 1965, dated 10th January, 1969.

of the respondents 1 to 3 to lead a highly religious and orthodox life for the rest of her lifetime and there is no evidence to indicate that the mother of the respondents 1 to 3 *is* depending upon the help of others even for her daily routine. On the other hand, the evidence points out that the mother of respondents 1 to 3 can look after herself and can do the work as well by herself and, therefore, the circumstance that the mother of respondents 1 to 3 wants to settle down at Kumbakonam to spend the rest of her lifetime without any male help cannot be put against the requirement of the respondents for that purpose. The omission to mention this as a ground in 1971 in P. C. OP. No. 14 of 1971 cannot be considered to be fatal to such a claim in the altered circumstances which obtained in 1979. There is nothing wrong in a person, specially the wife of an ascetic, entertaining the idea of spending the rest of her lifetime devoting herself to the worship of God and other pursuits predominantly religious and orthodox. The requirement of the house in order to enable the mother of the respondents to do so cannot in any manner be characterised as not *bona fide*. No doubt, no satisfactory materials have been placed befofe the authorities below to show that the third respondent had been advised to have a change of place and that that would facilitate his improving and, therefore, the authorities below were quite right is not upholding the claim of *bona fide* requirement on this ground. However, there is absolutely no justification for the Appellate Authority to differ from the conclusion of the Rent Controller with reference to the requirement of the respondents *bona fide* for the purpose of accommodating the mother of respodents 1 to 3 who wants to go to Kumbakonam and spend peacefully the rest of her days in this world. The order of the Appellate Authority declining to grant an order for eviction on this ground cannot therefore, be sustained and the respondents are entitled to an order for eviction on this ground as well. Consequent to the conclusions arrived at above, the order of eviction passed by the authorities below has to be upheld and the Civil Revision Petition dismissed with costs.

R. S. —— *Petition dismissed*

END OF VOLUME (1981) 1 M. L. J. (REPORTS.)